No. 05- (1)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JAMES A. KAY, JR. and MARC D. SOBEL,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Federal Communications Commission ("FCC" or "Commission"), in a license revocation proceeding, rejected an Administrative Law Judge's ("ALJ") determination that Marc D. Sobel ("Sobel") and James A. Kay, Jr. ("Kay") testified candidly and credibly in matters relating to their fitness to hold certain radio licenses. The Commission accorded no deference to the ALJ's candor and demeanor findings and failed to articulate a valid or record-based rationale for its failure to do so.

The question presented is:

> In an Administrative Procedure Act ("APA") adjudication on the record where witness credibility and demeanor are central to the outcome, do sections 8(a) and (b) of the APA, 5 U.S.C. § 557(b), (c), require an agency, when reviewing an ALJ's credibility and demeanor findings, to defer to those findings or provide a record-based and valid explanation of the agency's disagreement with those findings.

LIST OF PARTIES AND RULE 29.6 STATEMENT

Petitioner, James A. Kay, Jr. is an individual who presently holds land mobile licenses in the 800 MHz band authorized by the FCC under 47 C.F.R. Part 90. Petitioner Marc D. Sobel is an individual who presently holds land mobile licenses in the 800 MHz band authorized in accordance with 47 C.F.R. Part 90. The FCC is the agency of the United States authorized by 47 U.S.C. § 312 to grant and revoke the licenses held by Kay and Sobel.

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Kay and Sobel respectfully petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 396 F.3d 1184. Appendix A at 1a.

The orders of the court of appeals denying rehearing and rehearing en banc are unreported. Appendix K and Appendix L at 346a, 347a.

The initial decision of ALJ John M. Frysiak in Sobel's case is reported at 12 FCC Rcd 22879. Appendix J at 301a.

The initial decision of Chief ALJ Joseph Chachkin in Kay's case is reported at FCC 99D-04, 1999 WL 700534. Appendix I at 163a.

The FCC's decision in Sobel's case is reported at 17 FCC Rcd 1872. Appendix G and Appendix H at 109a, 156a.

The FCC's decision in Kay's case is reported at 17 FCC Rcd 1834. Appendix F and Appendix H at 45a, 156a.

The opinions and orders of the FCC denying reconsideration in Sobel's case are reported at 17 FCC Rcd 8562. Appendix B, Appendix D and Appendix E at 14a, 36a, 44a.

The opinion and order of the FCC denying reconsideration in Kay's case is reported at 17 FCC Rcd 8554. Appendix C and Appendix E at 23a, 44a.

STATEMENT OF JURISDICTION

The judgment of the District of Columbia Circuit was issued on February 1, 2005. App. A. Timely petitions for rehearing and rehearing en banc were denied April 5, 2005. Apps. K and L. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

The following authorities are set forth in Appendix M.

1. Sections 4–9 of the Administrative Procedure Act, 5 U.S.C. §§ 554-59. App. 349a to 362a.

2. Section 312 of the Communications Act of 1934, as amended, 47 U.S.C. § 312. App. 363a.

STATEMENT OF THE CASE

A. Introduction

Section 8(a) of the APA, 5 U.S.C. § 557(b), provides, in part, that in reviewing an ALJ's decision, "the agency has all the powers which it would have in making the initial decision." Noting "[this] rather obscure provision," this Court in *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 494 (1951), held that hearing officers (now called ALJs) hold an important place in the new APA regime of administrative adjudication and that their role "would be of consequence, for example, to the extent that material facts in any case depend on the determination of credibility of witnesses as shown by their demeanor or conduct at the hearing." *Id.* at 496, *quoting* S. Rep. No. 752, 79th

Cong., 1st Sess. 24 (1945). Four years later, in *Federal Communications Comm'n v. Allentown Broad. Co.*, 349 U.S. 358, 364 (1955), this Court held that section 8(a) of the APA does not require an agency to accept an ALJ's credibility and demeanor findings unless they are "clearly erroneous."

Since those early years after the enactment of the APA, this Court mostly has been silent, and the territory between "clearly erroneous" and "of consequence" remains somewhat uncharted. The absence of an articulated and uniform standard against which agencies can judge the credibility determinations of their ALJs creates uncertainty among the agencies, confusion among the litigants, and now a disagreement among the courts of appeals. This standardless environment suggests also to agencies and the courts that they have the authority to re-find facts and re-determine demeanor and credibility judgments initially determined by an ALJ to a far greater extent than is intended by the APA.

This case highlights the perils of ALJ-based administrative adjudication in the absence of cogent and uniform rules governing agency review. Here, in two related cases, involving identical issues, intersecting parties and overlapping witnesses, two ALJs reached conflicting determinations. One ALJ, following a two-day hearing, in which two witnesses, Kay and Sobel, testified, concluded that the petitioner Sobel lacked candor in dealing with the agency. Two years later, another ALJ, after a ten-day hearing, in which sixteen witnesses, including Kay and Sobel, testified, determined that both petitioners were credible, opposing witnesses were not, and that the petitioners did not lack candor in their dealings with the agency. The second ALJ also determined that the bureau responsible for prosecuting both cases had engaged in misconduct in both

proceedings and misled the ALJ in Sobel's case. Faced with conflicting ALJ determinations, the Commission announced that it would ignore both, including the explicit credibility and demeanor findings of the second ALJ. The Commission failed to articulate any valid reason for declining to defer to the credibility and demeanor findings of the second ALJ. The court of appeals affirmed without assessing whether the Commission's refusal to consider the credibility findings of the second ALJ was supported by the record and a valid rationale articulated by the Commission.

B. Background

1. The Communications Act of 1934 was enacted "to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority." 47 U.S.C. § 301. It created and vested the FCC with the authority to grant, renew, modify and, under certain circumstances, revoke licenses. 47 U.S.C. §§ 301, 309, 312. License revocation proceedings require notice to the licensee and a statement of the matters of interest to the FCC. 47 U.S.C. § 312(c). The Act also requires a hearing and imposes on the Commission the burden of proceeding with the introduction of evidence and the burden of proof. *Id.* § 312(d). Finally, the Act provides that the Administrative Procedure Act, 5 U.S.C. § 558(c)(1) and (2), *incorporating* 5 U.S.C. §§ 556 and 557, shall apply to any proceeding for revocation of a license or permit or any proceeding for the issuance of a cease and desist order. 47 U.S.C. § 312(e).

2. Petitioner James A. Kay has been providing commercial two-way mobile radio service in the Los Angeles,

California area since the early 1980s. He holds 152 land mobile licenses authorized by the FCC, operating in both the 800 MHz and 470-512 MHz bands. Petitioner Marc Sobel is a radio dealer, who sells and services two-way radios, provides repeater service, installs and maintains systems for users and other dealers, and provides consulting services. Although he initially operated solely in the UHF bands, in the early 1990s, Sobel applied for and received 800 MHz licenses. Kay and Sobel have been friends for many years and when Sobel developed an interest in the 800 MHz band, Kay helped Sobel apply for and implement his facilities, first under an oral agreement, then pursuant to a written management agreement, dated October 28, 1994, and later under an Amended Radio System Agreement, dated December 30, 1994.

3. On December 13, 1994, the FCC initiated license revocation proceedings against Kay. More than two years later, on February 12, 1997, the FCC instituted license revocation proceedings against Sobel. Kay intervened in the proceedings against Sobel. The hearing in Sobel's case took place on July 29 and 30, 1997, before ALJ John M. Frysiak. Only Sobel and Kay testified. On November 28, 1997, Judge Frysiak issued an initial decision ordering the revocation of Sobel's licenses and denying his pending applications. App. 301a. Judge Frysiak decided that Sobel's failure to make voluntary disclosure of the Management Agreement to the Commission and his failure to disclose the Management Agreement until July 1996, was "egregious in that it was wilful [sic], repeated and continued throughout the hearing." App. 344a, ¶ 78. From this, the judge decided that Sobel "intended to mislead and deceive the Commission with respect to Kay's actual role in the affairs of Sobel's 800 MHz stations" and "[r]evocation of all Sobel's licenses is

mandated." App. 344a, ¶¶ 77, 78. The Management Agreement had been disclosed, however, and the bureau that prosecuted the case knew it. The bureau not only failed to alert the ALJ to that fact, it affirmatively concealed that fact from the ALJ.

4. A different ALJ, Chief Administrative Law Judge Joseph Chachkin, heard Kay's case almost two years later, in a ten-day hearing involving the testimony of sixteen witnesses. Yet again, both Kay and Sobel testified, but unlike Judge Frysiak, Judge Chachkin found that both Kay and Sobel "answered questions put to them in a candid and forthright manner. Their testimony that they did not intend to deceive the Commission concerning their business dealings is entirely credible and is accepted." App. 268a, ¶ 173. *See also* App. 296a, 297a, ¶¶ 216, 218. He further found that "their testimony is buttressed by the evidence showing that Kay informed the Commission of their business relationship long before any questions were raised by the Bureau." App. 268a, ¶ 174. The judge found that Kay and Sobel did not intend to conceal their business arrangement from the Commission and that they had no motive to do so.[1] App. 294a, ¶ 213. Judge Chachkin found that "Judge Frysiak's decision was tainted" because on at least seven occasions, "the Bureau deliberately concealed the fact that Kay had given a copy of the Management Agreement to the Bureau on March 24, 1995." App. 263a-265a, ¶ 169. *See also* App. 292a at ¶ 210. The judge noted that he had "never seen prosecutorial misconduct of this magnitude in

[1] There is no basis for finding a motive to mislead the Commission because there is no limit to the number of 800 MHz licenses that a person or entity may own and therefore no reason to conceal ownership arrangements.

the twenty years he has presided over Commission cases." *Id.* n.49. For this reason, he explained that "Judge Frysiak's conclusion must be disregarded in determining Kay's fitness to be a licensee." App. 292a, ¶ 210. He decided that the Bureau's conduct in this case was unreasonable and that the lack of candor issue "contrived by the Bureau, is without substance." App. 295a, ¶ 214. Among other things, he concluded that the Bureau impermissibly "was engaged in a fishing expedition with the hope that something would turn up," that its request for documents from Kay was "extremely broad," and "arbitrary and unreasonable," that it showed an "unreasonable unwillingness to narrow its request," an unreasonable refusal to assure confidentiality of Kay's response, and irrationally and without explanation demanded fifty copies of Kay's response. App. 272a, 274a, ¶¶ 179, 181. On all other issues designated for hearing, the Bureau either agreed that there was no violation, App. 291a, ¶ 208, or Judge Chachkin found that the Bureau had not satisfied its burden of proof, App. 275a, 285a, 290a, 291a, 294a, 295a, ¶¶ 182, 199, 207, 209, 213, 214. Therefore, Judge Chachkin concluded that Kay was qualified to remain a licensee. App. 300a, ¶ 223.

5. Both cases proceeded to the FCC for review, and the Commission, on its own motion, considered the two proceedings together, but rendered separate, divided decisions in each case. Apps. F, G, and H. The FCC stated that it "considered the fact that Chief Judge Chachkin and Judge Frysiak reached inconsistent conclusions about the credibility of Kay and Sobel," but "decided not to defer to either ALJ." App. G at 117a, ¶ 10; App. F at 94a-96a, ¶¶ 86-87. The Commission did not, however, take testimony from Kay or Sobel or anyone else. Instead, after reading Kay and Sobel's testimony before Judge Frysiak, the Commission

discounted or rejected that testimony on some issues, App. G at 135a, 149a-150a, ¶¶ 49, 74, 75, and decided that Sobel's and Kay's testimony concerning their various roles in the stations at issue was "unpersuasive," *id.* at 125a, ¶ 22. *See also id.* at 131a, 146a, 149a, ¶¶ 38, 70, 75. Therefore, in Kay's case, the Commission disagreed with the ALJ's findings concerning the adequacy of Kay's response to the Commission, the ALJ's treatment of confidentiality, whether Kay lacked candor, and whether Judge Frysiak's decision was tainted by his reliance on the erroneous belief that Kay and Sobel did not disclose their Management Agreement to the Commission until July 1996. App. F at 67a, 71a, 75a-76a, 94a-96a, 103a, ¶¶ 40, 44, 48-50, 86-88, 98 n.23. According to the Commission, Judge Chachkin's findings concerning Kay and Sobel's credibility

> are not entitled to deference . . . in view of the fact that Judge Frysiak, who heard essentially the same testimony in the *Sobel* proceeding, clearly did not find these witnesses credible. We believe that the existence of these conflicting findings bears on whether such findings are supported by substantial evidence. . . . In view of the apparent conflict between the two judges' assessment of the witnesses' credibility, we did not defer to either ALJ but based our decision on our own independent assessment of the nature of the representations made and the circumstances that were involved.

Id. at 94a-95a, ¶ 86. Having invoked its "power of de novo review," the Commission declared that an additional hearing "would be wasteful and time consuming." According to the Commission, a new hearing would only result in "conflicting

credibility determinations that the Commission would have to resolve" so the Commission instead evaluated the witnesses' credibility without the benefit of seeing the witnesses with its own eyes. *Id.* at 95a, ¶ 86 n.18. Thus although the Commission found explicitly that the record did not sufficiently demonstrate that Kay had a motive for abusing the Commission's processes, *id.* at 86a, ¶ 70, it revoked both Kay and Sobel's licenses in the 800 MHz band, *id.* at 107a, ¶ 108; App. G at 154a, ¶ 86.

FCC Commissioner Kevin Martin dissented. In a Consolidated Separate Statement, he stated that the Commission had gone "too far in reversing Judge Chachkin's conclusions." App. H. Commissioner Martin was

> unwilling to approve, based on the conflicting and confusing record before us, the determination that James A. Kay, Jr. improperly failed to respond to requests for information and that Kay and Marc Sobel lacked candor in filings they made to the Commission. In the information request decision, the Commission reverses an ALJ's explicit findings that Kay acted reasonably in the face of a demanding inquiry by the Bureau—findings that are ordinarily accorded great deference. In the lack of candor decision, upon which two ALJs reached opposite conclusions, the Commission essentially sides with the first ALJ, even though he did not have accurate information on all of the relevant facts. In my view, the Commission does itself a disservice by making these decisions on the cold record before it. At the very least, the Commission should have

> referred this proceeding to a new ALJ to reconcile the conflicting decisions and make definitive findings.

Id. at 156a. Similarly, Commissioner Martin stated he was "unable, on the record before us, to reconcile the ALJs' conflicting decisions and determine that Judge Frysiak was not misled." *Id.* at 161a. He challenged the Commission's conclusion that Judge Frysiak would not have made a different decision had he known Kay and Sobel had provided the Bureau with a copy of the Management Agreement long before their candor was an issue, finding it impossible to reach such a conclusion on the ALJ's state of mind on the record before it. *Id.* at 161a n.1. He concluded: "Particularly given the severity of the sanctions at issue, I would not find that Kay and Sobel lacked candor." *Id.* at 161a.

All of the parties filed for reconsideration. On May 8, 2002, the Commission denied Kay's request and granted the Bureau's request. App. C. In reaffirming its decision to find that Kay lacked candor without relying on any ALJ's assessment of Kay's and Sobel's credibility, the Commission commented:

> This case is unusual in that evidence regarding the transfer of control and the lack of candor issues were heard by two different ALJ's: Chief Judge Joseph Chachkin in WT Docket No. 94-147 and Judge John M. Frysiak in WT Docket No. 97-56. Chief Judge Chachkin found that Kay and Sobel were truthful, while Judge Frysiak reached the opposite conclusion. Decision at ¶¶75-76, 78-79. In view of the fact that two ALJ's, each of whom had an opportunity to observe the witnesses

> reached contrary conclusions, the Commission, did not defer to either of them in resolving the issues, but rather relied on its own independent review of the full record in both cases. *Id.* at ¶¶ 86-91.

Id. at 30a, ¶ 7. Judge Frysiak made no explicit findings concerning credibility or demeanor; only Judge Chachkin did. The Commission, however, interpreted the outcome in Sobel's case as an implicit finding of lack of credibility by the ALJ. The Commission then reaffirmed its belief that Judge Frysiak's "conflicting findings" were consistent with its own de novo review of the record as a whole and bore "on whether Chief Judge Chachkin's findings are supported by substantial evidence." The Commission added:

> Just as we would not arbitrarily ignore an ALJ's credibility findings, we do not feel justified in ignoring the fact that a conflict exists between two experienced administrative law judges both of whom observed the witnesses. We also believe that the "cold" record in this case contains sufficient circumstantial and testimonial evidence for us to make reliable findings on the material questions of fact. We therefore decline to defer to Chief Judge Chachkin's credibility findings.

Id. at 31a-32a, ¶ 8 (footnote omitted).

On the same day, the Commission summarily denied a petition for reconsideration of the decision in Sobel's case and on January 15, 2004, the Commission denied a petition for reconsideration of the May 8, 2002 decision relating to the Commission's denial of a request by Sobel for an

investigation into the Bureau's conduct in this case. App. B, App. D. Commissioner Martin again filed a consolidated separate statement reiterating his disagreement with the determinations that Kay and Sobel lacked candor and restated his belief that a hearing in front of a new ALJ was required. App. E.

On February 1, 2005, the D.C. Circuit affirmed, holding that substantial evidence supported the Commission's decision. After reviewing the general standard of review, the D.C. Circuit recognized the problem presented in this case:

> Here, of course, the Commission faced conflicting findings by two ALJs who heard essentially the same testimony. Kay and Sobel stress that only ALJ Chachkin made express credibility determinations. This is true, but it does not render his findings more deserving of credit. As the Commission recognized, ALJ Frysiak's findings clearly rested on his disbelief of Kay's and Sobel's testimony.

App. A at 11a. The circuit court held that under 5 U.S.C. § 557(b), the Commission was not required to adopt the credibility determinations of an ALJ, and although the agency could give "much weight to an ALJ's credibility determinations, the question for the reviewing court remains the same whether the agency agrees or disagrees with the ALJ—is the agency's decision supported by substantial evidence." *Id.* at 10a. The court found the Commission's findings were so supported. On April 5, 2005, the court denied rehearing. App. 346a, 347a.

REASONS FOR GRANTING THE PETITION

A. There is No Clear Consensus Among the Circuits

In *Allentown*, this Court rejected, as too high, the "clearly erroneous" standard that the court of appeals used to assess the agency's decision to accept or reject an ALJ's credibility findings. No alternative standard was proposed.

Although a uniform standard of agency review has remained elusive, especially absent guidance from this Court, the courts of appeals, until now at least, have fashioned a rough, albeit standardless, consensus worded in varying ways that "when the ultimate determination of motive or purpose hinges entirely upon the degree of credibility to be accorded the testimony of interested witnesses, 'the credibility findings of the [ALJ] are entitled to special weight and are not to be easily ignored.'" *Ward v. NLRB*, 462 F.2d 8, 12 (5th Cir. 1972) (quoting *Russell-Newman Mfg. Co. v. NLRB,* 407 F.2d 247, 249 (5th Cir. 1969)). An agency is certainly permitted to disregard an ALJ's findings on credibility or demeanor, but can only do so if the agency "fully articulate[s] [its] reasons for so doing, and then, with heightened scrutiny, [the court] must decide whether such reasons find support in the record." *Aylett v. Sec'y of Hous. and Urban Dev.*, 54 F.3d 1560, 1566 (10th Cir. 1995); *see Haebe v. Dep't of Justice*, 288 F.3d 1288, 1301 (Fed. Cir. 2002) (holding that if the agency's "reasons for overturning demeanor-based credibility determinations are not sufficiently sound, its decision does not survive substantial evidence review");[2] *Morris v. Commodity Futures*

[2] The Merit Systems Protection Board, the agency in *Haebe*, was created by and operates pursuant to the Civil Service Reform Act of 1978, Public L. No. 95-454, 92 Stat. 1111 *et seq.*, codified, as (Cont'd)

Trading Comm'n, 980 F.2d 1289, 1294 (9th Cir. 1992) (recognizing that an agency can disagree with an ALJ's credibility determination, but it needs a good reason); *Carlisle Area School v. Scott P.*, 62 F.3d 520, 528 (3d Cir. 1995), *cert. denied*, 517 U.S. 1135 (1996) (holding that "credibility-based findings [of a hearing examiner] deserve deference unless non-testimonial, extrinsic evidence in the record would justify a contrary conclusion"); *JCC, Inc. v. Commodity Futures Trading Comm'n*, 63 F.3d 1557, 1566 n.27 (11th Cir. 1995) (noting that "courts of appeals apply a heightened standard of review where the ALJ and the Commission disagree"); *Pennzoil Co. v. Federal Energy Regulatory Comm'n*, 789 F.2d 1128, 1135 (5th Cir. 1986) (stating that courts engage in "heightened" review when the Commission rejects an ALJ's credibility determinations).

No matter what words are used by courts of appeals to articulate their respective tests, one theme emerges: an agency must defer to the credibility and demeanor findings of the hearing examiner who heard and saw the witnesses testify, unless there is a sound and specified reason articulated by the agency and supported by the record to do otherwise. This test serves a number of salutary purposes. First, it accommodates two important principles explicit in the APA: the right of a party, especially in a license revocation proceeding, to a meaningful on-the-record and live hearing including cross-examination, before an ALJ, and the right of the agency, where appropriate, to disregard the determinations

(Cont'd)

amended, in various sections of Title 5, United States Code ("CSRA"), including 5 U.S.C. § 7701 *et seq*. The relevant judicial review provisions in CSRA closely track those in the APA. *Compare* 5 U.S.C. § 7703(c)(1), (2), and (3) and 5 U.S.C. § 706(2)(A), (D) and (E), respectively.

of their ALJs. Second, it recognizes the special role of ALJs in administrative adjudications. These first-tier fact-finders, insulated from the political and bureaucratic pressures that might otherwise influence agency decision-making, are, according to Learned Hand, in a unique position to "take into consideration the whole nexus of sense impressions which they get from a witness" and which are lost in a transcript. *Dyer v. MacDougall*, 201 F.2d 265, 269 (2d Cir. 1952); *see Arnstein v. Porter*, 154 F.2d 464, 470 (2d Cir. 1946) (opining on the importance of live testimony in assessing demeanor and credibility).

In this case, the court of appeals ignored this common sense approach to assessing an agency's decision to disregard the credibility findings of an ALJ. Instead, the court concluded that "an agency is not required to adopt the credibility determinations of an administrative law judge[,]" and there was no need to even assess whether the agency's decision to disregard the findings of the ALJ was reasoned and supported by the record. App. A at 10a. According to the court, "[t]his much follows from § 557(b) of the APA [5 U.S.C. § 557(b)]: 'On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision,'" including, by implication, the power to make credibility determinations on a paper record. *Id.* The court reasoned that since this Court "rejected the idea that an agency must accept an ALJ's [credibility] findings unless those findings are clearly erroneous," the agency is therefore free to disregard those findings for any reason or no reason at all. *Id.* at 10a-11a.

The well accepted duty of explanation that comes with a decision to reject an ALJ's credibility and demeanor findings is abandoned by the court below. In contrast, under the views

shared by the Third, Fifth, Seventh, Tenth, Eleventh and Federal Circuits, an agency's freedom to reject an ALJ's credibility determinations is conditioned on whether the decision to do so is supported by the record and a reasoned explanation.[3] *See generally* Pierce, 2 ADMINISTRATIVE LAW TREATISE § 11.2 (4th ed. 2002). The court of appeals in this case eliminated those conditions precedent as superfluous. The only reason offered by the agency here for disregarding the ALJ's credibility determinations in the *Kay* proceeding was that the ALJ in the *Sobel* proceeding had reached a different determination. That, however, is not a reason based on the record in the *Kay* proceeding or for that matter, the record in any proceeding. The court of appeals had no good reason much less good law on which to excuse the agency from its APA-imposed duty of explanation. *See* 5 U.S.C. § 557(c).

In the court of appeals' view, the correct focus should not be on the rationale underlying the agency's rejection of

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[3] The D.C. Circuit did not affirm the FCC's conclusion that contradictory findings in separate cases may be resolved by ignoring the record supporting those findings as a per se rule, but instead combed the record of both Kay's and Sobel's cases in a search of substantial evidence, noting "[a]t the least, the Commission could find that the statements they [Kay and Sobel] filed were misleading and intentionally so." App. A at 12a. This was not, however, the basis for the Commission's decision and fails to review properly the Commission's fairly obvious refusal either to evaluate the ALJs' decisions in light of the record as a whole or to apply a correct legal standard to the review of demeanor and credibility determinations in an APA adjudication. The circuit court's finesse in one sense exceeds the court of appeals' authority by making its own findings on credibility and demeanor and by not examining the reasons why the Commission acted as it did, but also attempts to avoid the important question of administrative procedure that is squarely presented here.

the ALJ's credibility determinations, but rather on whether the agency's "decision is supported by substantial evidence." *Id.* Not only does this approach represent a significant departure from the way in which this Court and the courts of appeals in other circuits have approached the issue, it represents a significant break with courts, commentators, and the Executive Branch in their interpretation of the APA.[4] The Attorney General has provided a careful rationale for decisional processes in the APA and the defined relationship between the agency head (or commission) and the agency's hearing examiner. In the view of the Attorney General, administrative adjudication involves two principal components: (1) a decision at an evidentiary hearing by the a hearing examiner (*i.e.*, ALJ) who is structurally insulated from the agency; and (2) the agency control over policy, exercised largely through the agency's own review of ALJ decisions. The Attorney General's analysis of section 557(b) states: In "cases ['which depend on the determination of the credibility of witnesses as shown by their demeanor'], it is apparently assumed that agencies will attach considerable weight to the findings of the examiner who saw and heard the witnesses." Attorney General's Manual on the Administrative Procedure Act 84 (1947) (quoting from S. Rep. 752, 79th Cong., 1st Sess. 24 (1945)). Accordingly, "administrative law judge determinations of credibility will generally be respected." *See also* Daniel J. Gifford, *Adjudication in Independent Tribunals: The Role of an*

[4] This is not the first time that the District of Columbia Circuit has ignored the distinction between findings of fact based on credibility and findings based or designed to implement certain policy objectives. In *Swan Creek Communications, Inc. v. F.C.C.*, 39 F.3d 1217, 1221 (D.C. Cir. 1994), the court held that "the Commission is not bound by the ALJ's findings so long as its own findings are supported by substantial evidence."

Alternative Agency Structure, 66 NOTRE DAME L. REV. 965, 982 (1991). In Kay and Sobel's cases, neither the agency nor the court of appeals paid any respect to the ALJ determinations of credibility, or attached any weight or paid any special heed to those findings.

This Court should step in to resolve the conflict between the court below and the FCC, which seem aligned in support of a "no standard" standard and the many authorities to the contrary. Under the D.C. Circuit's view, section 557(b) relieves an agency of the burden of conducting record based review of an ALJ's demeanor findings or of explaining itself.

B. The Court of Appeals' Decision Undermines the Scheme of Hearing and Review Contemplated by the Administrative Procedure Act

The text and context of Section 8 of the APA, 5 U.S.C. § 557, as well as the contemporary history of its provisions reveal an unmistakable intent to require agencies with review authority over ALJ findings to accord more deference to an ALJ's credibility and demeanor determinations than was accorded here. Here, the FCC ignored the record made in both Sobel's and Kay's cases and concluded that the contradictory candor findings made by the two ALJs relieved the FCC of the obligation to review either record at all or defer to the express credibility and demeanor findings rendered by either one of the two ALJs. The decision to discard all demeanor findings is, therefore, off the record and plainly incompatible with the mandate that all aspects of a decision must be supported by the record and that the parties have an undeniable right to know the contents of the record in their cases. *See* 5 U.S.C. §§ 556(d), (e); 557.

The APA mandates a very different approach than the FCC's; the APA's authors have said so:

> The provision that on initial agency review of initial examiners' decisions it [the agency] has all the powers it would have had in making the initial decision itself does not mean that initial examiners' decisions or recommended decisions are without effect. They became part of the record and are of consequence, for example, to the extent that material facts in any case depend on the determination of credibility of witnesses as shown by their demeanor or conduct at the hearing. In a broad sense the agencies reviewing powers are to be compared with that of courts under section 10(e) of the bill.

Administrative Procedure Act Report of the House Comm. on Judiciary on S. 7., 79th Cong. 2d. Sess. (1946), ordered to be printed as *Administrative Procedure Act Legislative History*, 79th Cong. 1944-46, at 272-73 (1946); *see also id.* at 210.

The Attorney General's Manual reinforces Congress's expectation that credibility and demeanor determinations will be accorded "considerable weight." Attorney General's Manual on the Administrative Procedure Act at 84 (1947).[5]

The FCC did not conceal its refusal to consider the demeanor findings of either ALJ. It held that the findings

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[5] This Court considers the Attorney General's Manual an authoritative source in interpreting the provisions of the APA. *Darby v. Cisneros*, 509 U.S. 137, 148 n.10 (1993).

cancelled each other out notwithstanding that each ALJ heard different cases and presided over the construction of different records. The FCC's reasoning falls short of the required record review and reveals an undeniable belief on the part of the FCC that it is required neither to weigh nor consider the credibility and demeanor findings of either ALJ on the merits nor is it bound by any legal constraints or standards in abandoning those findings.

That surely was not what was intended by the authors of the APA and is not in keeping with the well-established premise that an agency faced with the prospect of rejecting an ALJ's credibility and demeanor findings may do so only if a valid reason is articulated, explained and supported by the record. From the beginning of this Court's APA jurisprudence, it has been recognized that a principal reason for the enactment of the APA is to enhance "the status and function of the trial examiner." *Universal Camera Corp.*, 340 U.S. at 494. The majority opinion in *Universal Camera* recognizes also that credibility and demeanor findings of experienced hearing officers are highly important evidence in cases where those factors are relevant, and that they must be given the weight and significance they deserve to ensure a "rational inquiry into truth." *Id.*, 340 U.S. at 496-97. Neither the FCC nor the court below met this elementary standard.

While *Allentown* identifies a standard that exceeds the upper limit of the degree of respect due the credibility and demeanor findings of ALJs, the courts of appeals properly have observed that much more than no respect is the correct standard to apply. *See e.g.*, *Carlisle Area School*, 62 F.3d at 528 (analogizing the standard of review of credibility findings to the standard in Rule 52(a) of the Federal Rules of Civil Procedure, which provides "due regard shall be given to the opportunity of the trial court to judge the credibility of the

witnesses");[6] *Mattes v. United States*, 721 F.2d 1125, 1129 (7th Cir. 1983) ("[T]he ALJ's determinations are not entitled to any special deference from the agency except insofar as the ALJ's findings are based on witness credibility determinations.").

Similarly, the courts consistently have applied a "good reason" standard to an agency's refusal to accept credibility and demeanor determinations. *See e.g. Elliott v. Commodity Futures Trading Comm'n*, 202 F.3d 926, 937 (7th Cir. 2000); *Parker v. Bowen* 788 F.2d 1512, 1520 (11th Cir. 1986) (citing 5 U.S.C. § 557(b)); *JCC Inc.*, 63 F.3d at 1566 (same); *Illinois v. United States*, 666 F.2d 1066, 1073 (7th Cir. 1981) (holding "(c)ourts are no longer satisfied with bare administrative ipse dixits. . . . Although the agency certainly may draw a differing conclusion, it is important for the agency to clearly explain the nature and rationale of its differing conclusion") (collecting authorities); *Pennzoil*, 789 F.2d at 1135.

Other authorities uniformly reinforce the judicial recognition that agencies have no right of nullification of ALJ credibility and demeanor findings. In an address to a gathering of ALJs, Judge Patricia Wald said,

> When you base your findings clearly on the credibility or demeanor of witnesses, you are at

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[6] *See Anderson v. Bessemer City*, 470 U.S. 564, 576 (1985) ("When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference . . . . for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." (citation omitted)). It is hard to see a rationale for the belief that the truth-seeking exercise under Rule 52 must be different than that conducted in an APA proceeding. No agency has a protected interest in disregarding truthful information without any explanation.

> the zenith of power, even when there are conflicting stories.

Patricia M. Wald, *Some Thoughts On Beginnings and Ends: Court of Appeals Review of Administrative Law Judges Findings and Opinions*, 67 WASH. U. L.Q. 661, 667 (1989); *see also* Gifford, *supra* at 982; ADMINISTRATIVE LAW TREATISE, *supra*. *See also* Associate Justice Tom C. Clark, *Administrative Justice 1960*, 13 ADMIN. L. REV. 6, 8 (1960-61) ("As early as 1951, Dean Pound gave an interesting lecture on his distrust of administrative agencies. It might be summed up in his simple sentence, 'Perhaps the most serious [criticism] is a tendency to decide without a hearing, or without hearing one of the parties, or by a mere appearance of a hearing—going through the appearance of one, the results having been predetermined.'"). Justice Clark promised that the Court would know how to deal with this case when it came along. *Id.*

There has not been a great deal of debate over the correct standards to apply to ALJ credibility and demeanor findings, and surely, even in *Allentown*, this Court had no intention to launch a standardless principle awarding agencies carte blanche to do whatever they wanted. Yet here, the FCC, for no good reason, refused to consider whether the ALJs' findings in both Kay's and Sobel's cases were appropriate in light of the record as a whole. The Commission simply discarded both findings notwithstanding whatever was in the record. The court of appeals affirmed and in so doing

sanctioned an utterly arbitrary approach that is far out of step with the APA, its history and its jurisprudence.

C. Fundamental APA Principles Are Implicated

Congress enacted the APA to encourage uniformity in administrative practice for all agencies and to foster a comprehensive set of standards and principles applied "across the board" to enforce a high degree of adjudicatory discipline and fairness, in agency adjudications. *See Steadman v. SEC*, 450 U.S. 91, 96 (1981); *Director OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994). The APA is one of the very few statutes that precludes its own supercedure except by express congressional action. 5 U.S.C. § 559.

The Commission's departure from the long-standing norm in reviewing credibility and demeanor determinations by an ALJ departs also from the purposes of the APA and suffers from the additional defect of being unjustified. There hardly is a legally principled justification for discarding an ALJ's credibility and demeanor findings without much attempt at a reasoned explanation, especially on the meager and non-record pretext suggested by the Commission here.

It is no answer within the APA scheme for the reviewing court to tramp around in the record in search of substantial evidence not relied upon by the agency.[7] That is precluded

[7] The Commission's brief in the court of appeals searched the record for evidence but this post hoc rationalization of counsel is not a proper focus of the court of appeals review of the Commission's decision. *Motor Vehicles Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 50 (1983) ("[A]n agency's action must be upheld if at all, on the basis articulated by the agency itself.").

by general principles of appellate review, *see SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943), and the exercise itself virtually precludes substantial evidence review. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439-40 (4th Cir. 1997) (failure of the factfinder or review board to consider all relevant and material evidence under a correct legal standard precludes substantial evidence review). *See also Elliott*, 202 F.3d at 940 (Easterbrook dissenting). It is all the more troubling in a case like Kay's, where the ALJ found prosecutorial misconduct by agency personnel, a finding that also is simply disregarded without explanation by the Commission.

The absence of standards reflected in the Commission's decision and by implication in the court of appeals' affirmance of it, effectively relieves the agency of its burden of proof in a matter as serious as a license revocation proceeding, and in a very real sense deprives license holders of their statutory rights to a full and fair revocation hearing before their licenses may be revoked. *See* 5 U.S.C. § 558(c); 47 U.S.C. § 312.

The body of administrative law would benefit from a uniform consistent legal standard for determining when a reviewing agency subject to the APA may downgrade or discard an ALJ's credibility and demeanor findings. The FCC's decision suggests a preference for no standard or absolute de novo consideration, a premise that was considered and rejected by the Congress sixty years ago. The Court of Appeals decision suggests its concurrence in the "no standard" test. The matter is important enough to merit this Court's completion of the unfinished analysis undertaken in *Allentown* fifty years ago.

CONCLUSION

This Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DECIDED FEBRUARY 1, 2005

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued December 6, 2004 Decided February 1, 2005

No. 02-1175

JAMES A. KAY, JR.,

APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION,

APPELLEE

Consolidated with
No. 04-1045

Appeals of Orders of the
Federal Communications Commission

Before: EDWARDS, SENTELLE, and RANDOLPH, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* RANDOLPH.

RANDOLPH, *Circuit Judge*: These are consolidated appeals from orders of the Federal Communications

Appendix A

Commission sanctioning James A. Kay, Jr., and Marc D. Sobel for intentionally trying to mislead the Commission, and for engaging in an unauthorized transfer of control of Sobel's land mobile service facilities. Kay and Sobel argue that the administrative record does not contain substantial evidence to support the orders.

I.

Since the early 1980's Kay has provided two-way radio mobile service in the Los Angeles area through a sole proprietorship — Lucky's Two-Way Radio. He held many land mobile licenses pursuant to Part 90 of the Commission's rules, 47 C.F.R. § 90.1 *et seq.*, including 34 licenses in the 800 MHz band. Sobel also was involved in the land mobile business in and around Los Angeles. He too held licenses for commercial land mobile radio stations, including 15 licenses on the 800 MHz band. In the early 1990's the Commission received information that Kay might have been evading certain regulatory restrictions by conducting business under other names. One of the names was "Marc Sobel dba Airwave Communications." Other information suggested additional violations. The Commission may require licensees to submit written statements of fact bearing on the question whether their licenses should be revoked. 47 U.S.C. § 308(b). To that end, the Commission's Wireless Telecommunications Bureau sent Kay a letter in January 1994 requesting several categories of information, including the identity of the stations for which Kay held licenses and the stations Kay managed. Kay's lawyer responded with a series of demands and complaints, but supplied none of the information the Bureau sought.

Appendix A

In December 1994 the Commission issued an order designating issues for a hearing, including: (1) whether Kay had violated § 308(b) by failing to provide the information requested; (2) whether he had willfully violated Commission rules governing station construction and operation; (3) whether he had abused the Commission's processes by filing applications in multiple names to avoid complying with the channel sharing and recovery rules; and (4) whether, in view of the evidence adduced on those issues, Kay was fit to be a licensee. The order identified 164 call signs subject to the hearing, eleven of which were held in Sobel's name.

About one month later, in January 1995, Kay filed a sixteen-page motion with the administrative law judge assigned to the case. Among other things, the motion requested deletion of Sobel's call signs from the hearing designation order. Kay's motion stated:

> James A. Kay, Jr. is an individual. Marc Sobel is a different individual. Kay does not do business in the name of Marc Sobel or use Sobel's name in any way. As shown by the affidavit of Marc Sobel attached as Exhibit II hereto, Kay has no interest in any of the licenses or stations held by Marc Sobel. Marc Sobel has no interest in any of the licenses or stations authorized to Kay or any business entity in which Kay holds an interest. Because Kay has no interest in any license or station in common with Marc Sobel and because Sobel was not named as a party to the instant proceeding, the presiding officer should either change the [Order] to delete the reference to the

> stations identified as stations 154 through 164 . . . or should dismiss the [Order] with respect to those stations.

In a signed affidavit accompanying his motion, Kay declared under penalty of perjury that the statements in the motion were "true and correct."

Sobel's affidavit, attached to the motion, stated:

> I, Marc Sobel, am an individual, entirely separate and apart in existence and identity from James A. Kay, Jr. Mr. Kay does not do business in my name and I do not do business in his name. Mr. Kay has no interest in any radio station or license of which I am the licensee. I have no interest in any radio station or license of which Mr. Kay is the licensee. I am not an employer or employee of Mr. Kay, am not a partner with Mr. Kay in any enterprise, and am not a shareholder in any corporation in which Mr. Kay also holds an interest. I am not related to Mr. Kay in any way by birth or marriage.

The ALJ certified the matter to the Commission and the Commission deleted Sobel's licenses from the Kay proceeding. *Kay Modified HDO*, 11 F.C.C.R. 5324 (1996). Thereafter, on June 11, 1996, the Bureau sent a § 308(b) letter of inquiry to Sobel, asking him for information about his business relationship with Kay. *Sobel Order*, 17 F.C.C.R. 1872, 1873 ¶ 4 (2002). In his response, dated July 3, 1996, Sobel attached a "Radio System Management and Marketing

Agreement." The Management Agreement, originally executed by Sobel and Kay in October 1994 and re-executed on December 30, 1994, set out the terms under which Kay had been managing, during the previous three years, fifteen of Sobel's stations, licensed on the 800 MHz band. (Kay had given the Bureau a copy of the same agreement on March 24, 1995, in response to the Bureau's discovery request seeking all management agreements to which Kay was a party.)

By early 1997, Sobel had 13 license applications pending with the Commission. Rather than grant any of them, the Commission designated them, and the licenses Sobel already held, for a hearing to determine whether Sobel had transferred control of the stations named in the Agreement to Kay, in violation of § 310(d) of the Communications Act, 47 U.S.C. § 310(d). *Marc Sobel*, 12 F.C.C.R. 3298, 3300 (1997). Section 310(d) provides that no "station license, or any rights thereunder, shall be transferred . . . to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience and necessity will be served thereby." The Commission later added another issue: whether Sobel had misrepresented facts or lacked candor in the affidavit he submitted in support of Kay's January 1995 motion to remove Sobel's licenses from the Kay hearing. *Marc Sobel*, FCC 97M-82 (released May 8, 1997).

Sobel's hearing, in which Kay intervened, was the first to be completed. *See Marc Sobel*, 12 F.C.C.R. 22879 (ALJ 1997). ALJ Frysiak determined that Sobel had illegally transferred control of the stations identified in the

Management Agreement. The evidence showed that Kay was managing the stations; that Kay had prepared Sobel's license applications; that Kay provided all the money and equipment to build the stations; that Kay's employees were involved in nearly all aspects of the day-to-day operation of the stations; that Kay paid all the expenses of the stations; that the revenues from operations went into Kay's bank accounts; that Sobel received none of the operating revenues; and that Kay had an option to purchase each of the stations at any time for $500 each. 12 F.C.C.R. at 22901. ALJ Frysiak also found that, in light of this evidence, Sobel's statement in his affidavit that Kay had "no interest" in any of his radio stations or licenses was "intended to mislead and deceive the Commission with respect to Kay's actual role in the affairs of Sobel's 800 MHz stations." The evidence also showed that Sobel, in response to problems identified in his applications, provided the Commission with customer invoices for the stations listed in the Agreement. On the invoices, Kay had masked out the name and address of "Lucky's Two Way Radio"— a name under which Kay conducts business. ALJ Frysiak found that both Sobel and Kay thought it crucial to withhold this information, which would have revealed to the Commission that Kay and Sobel were "not as independent of one another as Sobel has claimed." *Id.* at 22902, 22898-99. The ALJ concluded that all of Sobel's licenses designated for the hearing should be revoked and that his applications should be denied.

Nearly two years after the ALJ's decision in Sobel's case, ALJ Chachkin issued his decision in Kay's case. *James A. Kay, Jr.*, FCC 99D-04, 1999 WL 700534, ¶ 223 (ALJ, released Sept. 10, 1999). ALJ Chachkin accepted the ruling in the

Sobel case that Kay had participated in an unauthorized transfer of control of Sobel's stations. But he found "entirely credible" Kay's and Sobel's testimony that they had not intended to deceive the Commission about their business arrangement. ALJ Chachkin also accepted as "entirely reasonable and credible" Kay's testimony that when his motion stated he had no "interest" in Sobel's "licenses or stations," he meant that he had no "ownership interest" in any "station license" held by Sobel. He discounted the findings in the Sobel hearing, believing them "tainted" because the Bureau had "deliberately concealed" from ALJ Frysiak the fact that Kay had produced the Agreement in March 1995, in response to a discovery request. *Id.* at ¶¶ 168-69, 210.

The Commission considered the Sobel and Kay cases concurrently and issued decisions in both cases on the same day. For reasons we will discuss in a moment, the Commission found that Sobel had engaged in an unauthorized transfer of control of the stations listed in the Agreement, in violation of § 310(d), that Sobel and Kay lacked candor when they denied that Kay had an interest in Sobel's stations, and that Kay violated § 308(b) when he failed to provide information the Bureau requested. One Commissioner dissented from the findings regarding lack of candor and § 308(b). As sanctions for Sobel's two violations, the Commission revoked his licenses listed in the Management Agreement, and denied all of his pending 800 MHz applications. With respect to Kay, the Commission revoked his 25 licenses in the 800 MHz band and assessed a $10,000 forfeiture for failing to comply with § 308(b). (Kay does not challenge the forfeiture.)

Appendix A

II.

We will discuss first the Commission's determination that there had been an unauthorized transfer of control of Sobel's stations to Kay, in violation of § 310(d), a determination that bears heavily on the lack of candor question. Kay and Sobel argue that there is no substantial evidence that they engaged in a transfer of control because Sobel retained a proprietary interest in the stations, had unfettered access to the facilities, regularly visited the transmitter sites and gave Kay only an option to purchase the stations.

The evidence Kay and Sobel mention may point against the Commission's conclusion, but that is not the test. "Substantial evidence," in the sense used in the Administrative Procedure Act, 5 U.S.C. § 706(2)(E); *see* 47 U.S.C. § 402(e), is the amount of evidence constituting "'enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn . . . is one of fact for the jury.'" *Illinois Cent. R.R. v. Norfolk & W. Ry.*, 385 U.S. 57, 66 (1966), *quoting NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939); *see Ass'n of Data Processing Orgs., Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 745 F.2d 677, 684 (D.C. Cir. 1984). Adhering to its decision in *Intermountain Microwave*, 24 Rad. Reg. (P&F) 983, 984 (1963), the Commission considered evidence bearing on six factors to determine whether Sobel had transferred control of the Management Agreement stations to Kay. On the first factor, it agreed with Sobel that he had unfettered access to the stations. On the second factor — who controls the daily operations of the stations — the

evidence was overwhelming that Kay did. The Management Agreement provided as much: Kay's duties included "all administrative and office functions" and "all management functions." In addition, under the Agreement Kay was the "sole and exclusive supplier of all equipment and labor." The third *Intermountain* factor asks who determines and carries out policy decisions and prepares and files applications with the Commission. The evidence showed that Kay prepared Sobel's applications, set billing rates, and arranged for the acquisition of stations. The fourth factor asks who is in charge of personnel. Sobel had no employees; all of the employees at the Management Agreement stations were Kay's. The fifth factor asks who is in charge of financing. Here again the evidence showed that Kay was in charge. For instance, the Management Agreement relieved Sobel of liability for the operation and construction of the stations; Kay paid all the operating expenses; and Kay purchased all the equipment. The sixth *Intermountain* factor asks who receives profits from the operation of the stations. The Commission pointed to evidence that all revenues from operation of the stations had been deposited into Kay's account and that Sobel had received nothing in his capacity as an owner of the stations. Under the Management Agreement, revenues could be shared equally between Kay and Sobel if the stations generated enough profit, but that had not occurred. The Commission viewed this arrangement as "in the manner of partners." *Sobel Order*, 17 F.C.C.R. 1872, 1884 ¶ 45 (2002).

In the face of this evidence, there is no doubt that a reasonable jury, instructed on the law set forth in *Intermountain*, could have reached the same conclusion as

the Commission — that Sobel had transferred control of his stations to Kay without Commission authorization. *See Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 366-67 (1998).

This brings us to the Commission's finding that Kay and Sobel lacked candor with respect to their business relationship. Because effective regulation depends on the information licensees provide to the Commission, *see Leflore Broadcasting Co., v. FCC*, 636 F.2d 454, 461 (D.C. Cir. 1980), the Commission defines lack of candor to include not only providing false information but also "concealment, evasion or other failure to be fully informative accompanied by an intent to deceive." *Trinity Broad. of Fla., Inc.*, 10 F.C.C.R. 12020, 12063 (1995). While Kay and Sobel have several arguments against the Commission's lack of candor findings, their principal contention is that they did not intend to deceive and that the Commission erred in not accepting ALJ Chachkin's finding that their testimony to this effect was credible.

The law is settled that an agency is not required to adopt the credibility determinations of an administrative law judge. This much follows from § 557(b) of the APA: "On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision. . . ." On questions of facts, an agency reviewing an ALJ decision is not in a position analogous to a court of appeals reviewing a case tried to a district court. *See* Rule 52(a), FED. R. CIV. P. The Supreme Court, in *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), rejected the idea that an agency must accept an ALJ's findings unless

those findings are clearly erroneous. This is so even if the ALJ's findings rested on his evaluation of the credibility of the witnesses. *FCC v. Allentown Broad. Corp.*, 349 U.S. 363-64 (1955). Although the agency may give much weight to an ALJ's credibility determinations, the question for the reviewing court remains the same whether the agency agrees or disagrees with the ALJ — is the agency's decision supported by substantial evidence. The rejected factual determinations of the ALJ are simply a factor for the reviewing court to consider in its substantial evidence inquiry. *See Universal Camera*, 340 U.S. at 496-97; *Swan Creek Communications, Inc. v. FCC*, 39 F.3d 1217, 1222 (D.C. Cir. 1994); *WHW Enters., Inc. v. FCC*, 735 F.2d 1132, 1141 (D.C. Cir. 1985).

Here, of course, the Commission faced conflicting findings by two ALJs who heard essentially the same testimony. Kay and Sobel stress that only ALJ Chachkin made express credibility determinations. This is true, but it does not render his findings more deserving of credit. As the Commission recognized, ALJ Frysiak's findings clearly rested on his disbelief of Kay's and Sobel's testimony. *FCC Decision (James A. Kay)*, 17 F.C.C.R. 1834, 1860 ¶ 86 (2002). Nor did the Commission err in rejecting the ALJ Chachkin's findings on the ground that the proceedings before ALJ Frysiak were somehow tainted in view of the Bureau's failure to reveal that Kay, in response to a production of documents request, had given a copy of the Management Agreement to the Bureau at the end of March 1995. ALJ Chachkin made much of this supposed "scheme" and accused the Bureau of misleading ALJ Frysiak. The Commission gave two responses, both of which were sufficient. First, Kay's

production of the Agreement in March was not material. It is conceded that neither he nor Sobel supplied a copy of the Agreement with the January 1995 pleading and affidavit that stands at the center of their lack of candor. Second, the record shows that Sobel brought Kay's production to ALJ Frysiak's attention. He requested the Bureau to admit receiving the document (ALJ Frysiak denied the request as irrelevant) and he requested the ALJ to take official notice of Kay's production.

As to the rest of the evidence bearing on lack of candor, the record as a whole demonstrates ample support for the Commission's conclusions. The affidavit and the pleading were false and misleading. Kay, in the pleading, and Sobel, in his affidavit, denied that Kay had any "interest" in Sobel's licenses and stations. As the evidence relating to transfer of control shows, Kay had a very substantial interest in Sobel's stations. Kay and Sobel testified that when they used the word "interest" they meant an ownership interest and that their statements were therefore accurate because Sobel retained ownership of his licenses. But what of the stations? According to their testimony, they meant to refer only to ownership of Sobel's radio station licenses, not the stations themselves. Excerpts from July 29, 1997 Hearing Transcripts in WT Docket No. 97-56, *reprinted in* JA 532 (testimony of Marc Sobel); Excerpts from Jan. 19, 1999 Trial Transcript in WT Docket No. 94-147, *reprinted in* JA 1043 (testimony of James Kay). The Commission was entitled to reject that testimony. At the least, the Commission could find that the statements they filed were misleading and intentionally so. The sheer implausibility of their explanations; their motive to divert the Bureau's investigation, which threatened to uncover the

unauthorized transfer of control; the fact that they discussed the meaning of the word "interest" before they filed the pleading and affidavit; the fact that Kay told Sobel the word meant "a direct financial stake," which describes Kay's relationship to Sobel's stations — all this, and more, convince us that substantial evidence supported the Commission's findings of lack of candor. In other respects the Commission found the statements filed in January 1995 misleading, but it is unnecessary to discuss why we find substantial evidence to support those findings. It is enough to point out that "the Commission must rely heavily on the completeness and accuracy of the submissions made to it, and its applicants in turn have an affirmative duty to inform the Commission of the facts it needs in order to fulfill its statutory mandate." *RKO Gen., Inc. v. FCC*, 670 F.2d 215, 232 (D.C. Cir. 1981). The Commission reasonably concluded that Kay and Sobel intentionally failed to perform their affirmative duty in their attempt to remove Sobel's licenses and stations from the original hearing on Kay's fitness to be a licensee.

Affirmed.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION RELEASED JANUARY 15, 2004

Before the
Federal Communications Commission
Washington, D.C. 20554

WT Docket No. 97-56

In the matter of

MARC SOBEL

Applicant for Certain Part 90 Authorizations in the Los Angeles Area and Requestor of Certain Finder's Preferences

MARC SOBEL AND MARC SOBEL
D/B/A AIR WAVE COMMUNICATIONS

Licensee of Certain Part 90 Stations in the Los Angeles Area

MEMORANDUM OPINION AND ORDER

Adopted: January 8, 2004 Released: January 15, 2004

By the Commission:

I. INTRODUCTION

1. This order denies a Petition for Reconsideration, filed June 7, 2002, by Marc D. Sobel, and clarifies the relationship

of certain matters to this hearing proceeding.[1] Sobel seeks reconsideration of the Commission's order on reconsideration in *Marc Sobel*, FCC 02-138 (May 8, 2002) (Reconsideration Order), in which the Commission denied Sobel's previous petition for reconsideration of the Commission's decision in *Marc Sobel*, 17 FCC Rcd 1872 (2002), *recon. denied*, FCC 02-138 (May 8, 2002), *appeal pending*, No. 02-1174 (D.C. Cir. Jun. 5, 2002) (Decision).

II. BACKGROUND

2. By way of background, in our Decision, we revoked certain of Sobel's licenses and denied certain of his applications for land mobile facilities. We found that Sobel had transferred control of some of his facilities without authorization, in violation of 47 U.S.C. § 310(d), and lacked candor in a filing concerning these stations. Additionally, in the course of these proceedings, Sobel filed a pleading entitled "Request for Inquiry and Investigation" (Request).[2] The Request alleged that the Commission's Wireless Telecommunications Bureau (WTB), among other things, committed misconduct in the investigation and prosecution of this proceeding and displayed bias against Sobel and his associates. In our Decision, we held that no further action on the Request was warranted. 17 FCC Rcd at 1875-78 ¶ 9. Specifically, we noted that Sobel stated that the Request did not challenge the presiding administrative law judge's

1. The quoted language is from the actual order designating Kay's licenses for hearing. Tr. 258-259.

2. Sobel filed the Request on February 27, 1998 and filed a revised Request on March 2, 1998.

conduct of the hearing or the Commission's action in designating the hearing. Rather, Sobel said that the Request sought a separate investigation of the Bureau. Because Sobel did not challenge the conduct or designation of the hearing, our Decision held that the Request did not bear on our review of the initial decision. Even so, we examined the allegations contained in the request to ensure that WTB's alleged conduct had not prejudiced Sobel in this proceeding. Based upon a review of the full record in this proceeding, we held that there was an ample basis to designate this proceeding for hearing and that Sobel received a full opportunity to meet the issues raised. In the absence of any material prejudice to Sobel, we found no basis to take further action on the Request in this proceeding. We did not, however, address the Request in the ordering clauses of the Decision.

3. In our Reconsideration Order denying reconsideration of the Decision, the Commission did not address further the merits of the Request. However, we noted that:

> Kay and Sobel observe [in their petitions for reconsideration] that the ordering clauses in our decision did not explicitly address the [Request]. We will remedy this oversight and deny the request in this order.

FCC 02-138 at ¶ 11. We added an ordering clause denying the Request. *Id.* at ¶ 10.

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III. PLEADINGS

4. In his current petition for reconsideration, Sobel states that: "For purposes of the *Request for Inquiry*, Sobel is not – as he repeatedly stated – seeking relief from sanctions that may be imposed in the license revocation proceeding." Petition for Reconsideration at 2 ¶ 3. Sobel indicates that he seeks to bring to the Commission's attention Bureau misconduct and asks the Commission to conduct an investigation completely separate from this proceeding. He states: "Whether or not Sobel was prejudiced – indeed whether or not Sobel should prevail in the hearing case – is an entirely separate and irrelevant matter." Petition for Reconsideration at 3 ¶ 5. Accordingly, Sobel contends that it was improper for the Commission to deny the Request without further addressing the merits of the allegations made.

5. The Enforcement Bureau (Bureau) responds in its Opposition that the Commission appropriately addressed the Request. The Bureau states that WTB filed an extensive opposition to the Request that dealt exhaustively with the allegations contained therein. The Bureau further states that the Commission addressed the allegations in the Request, that Sobel was afforded a full opportunity to meet the issues, and that no further action is warranted.

6. Sobel answers in its Reply that the issue is not whether these matters should have been addressed in the license revocation proceedings. Rather, Sobel explains that the issue is the Commission's failure to consider all of the factual allegations. Sobel states that he assumed that because the Commission did not consider the allegations further in the

hearing proceeding, this implied that the Request would be considered outside the context of the hearing proceeding and that the Request was still pending. Sobel therefore contends that the Commission should address the merits of the Request further.

IV. DISCUSSION

7. We deny reconsideration and clarify that the Commission's prior order denying the Request demonstrates that no further consideration of the allegations contained in the Request is warranted in the context of this proceeding. Sobel's Request asked the Commission to conduct an investigation:

> into the facts and circumstances surrounding the designation and prosecution of the captioned proceeding; that Sobel be made a party to the investigation and afforded full discovery rights; and that, upon conclusion of the investigation, the Commission make findings and fashion appropriate relief.

Revised Request at 55. Sobel specified that "appropriate relief" should "redress the violations of Sobel's procedural, substantive, and civil rights." *Id.* at 2 ¶ 2. The Commission's Decision recognized that Sobel's request for relief raised the issue of whether the Bureau's alleged conduct prejudiced the designation or prosecution of this proceeding and thereby called for remedial measures by the Commission to ensure that Sobel's right to a fair hearing had not been abridged.

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8. Our Decision indicates that we fully considered the Request insofar as it raised issues of potential prejudice to Sobel in this license revocation proceeding and that the Commission concluded that with respect to this question no further action was warranted. Neither Sobel's earlier petition for reconsideration of the Decision nor his instant petition directed to the Reconsideration Order raises any challenge to that conclusion. Indeed, Sobel makes clear that his petition for reconsideration does not seek relief from sanctions imposed in the revocation proceeding.

9. To eliminate any possible uncertainty on this point, we wish to reemphasize and to state in one place that we have fully considered all of the issues raised, with a view to any potential prejudicial effect. We rejected on its merits the one issue raised by the Request that directly implicates the disposition of the revocation proceeding involving Sobel. Sobel alleges that the WTB had no valid basis to seek the designation of issues against him. Revised Request at 3-12 ¶¶ 3-21. In our Decision, however, we concluded that the allegations against Sobel were well-founded, and we revoked his licenses and denied his applications on that basis. 17 FCC Rcd at 1893-94 ¶¶ 79-80.

10. We also rejected on the merits Sobel's complaint that he was treated unfairly because the proceedings against him were motivated by the WTB's unfounded bias against one of Sobel's business associates, James A. Kay, Jr. In our Decision, we found ample basis to fault Kay's relationship with Sobel. We held that Sobel had transferred control of some of his facilities to Kay without authorization and that Sobel lacked candor in an affidavit filed on behalf of Kay.

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In a decision in a related proceeding, we imposed sanctions against Kay for his participation in this and other misconduct. *James A. Kay, Jr.*, 17 FCC Rcd 1834 (2002), *recon. denied*, FCC 02-137 (May 8, 2002), *appeal pending*, No. 02-1175 (Jun. 5, 2002). As an indication of WTB's bias against Kay, Sobel complains that WTB had no valid basis to seek the designation of issues against Kay (Revised Request at 28-30 ¶¶ 57, 38 ¶¶ 75-76), a position we rejected in the Kay proceeding.[3]

11. Finally, Sobel's remaining allegations raise no possibility of prejudice. Sobel complains that WTB conduct evidences a pattern of bias in favor of Kay's "enemies" (*i.e.*, his competitors) who complained about Kay. First, Sobel complains that the WTB practiced a double standard in which it ignored misconduct by Kay's enemies, such as Harold Pick, James Doering, Liberty Paving, Inc., and Christopher C. Killian, at the same time it was pursuing allegations of misconduct against Kay and Sobel. Revised Request at 13-27 ¶¶ 22-52. Second, Sobel accuses the WTB of attempting to interfere with Kay's business by frustrating Kay's efforts to obtain a cancelled license held by Thompson Tree Service (Revised Request at 32-34 ¶¶ 62-68) and by hampering Kay's efforts to prosecute Harold Pick for theft (Revised Request at 35-37 ¶¶ 69-74). Third, Sobel accuses the WTB of using a section 308(b) letter of inquiry to harass Kay and injure his

3. In addition to the transfer of control and lack of candor issues discussed above, we considered other issues. In a prior order, we held that WTB had shown good cause to seek issues relating to Kay's response to WTB's 308(b) letter of inquiry and the loading of Kay's land mobile stations. *James A. Kay, Jr.*, 13 FCC Rcd 16369, 16372-73 ¶¶ 10-11 (1988), *pet. recon. denied*, 14 FCC Rcd 1291 (1998).

business, an allegation rejected in the Kay proceeding.[4] Fourth, Sobel charges that the WTB participated in the preparation of false statements by Harold Pick and Richard L. Lewis.[5] Revised Request at 39-53 ¶¶ 77-99.

12. The allegations that the WTB favored Kay's enemies over Kay do not raise any possibility of prejudice in this or the Kay proceeding. They did not involve the designation or prosecution of the proceedings and thus did not affect the ability of the presiding administrative law judges or the Commission to fully and fairly deliberate on the issues relating to Sobel's licenses.[6]

13. As previously noted, Sobel's petition does not challenge the conclusions set forth above regarding prejudice. Sobel, however, now indicates that the Request has the more general purpose to: "bring to the Commission's attention numerous

4. We specifically rejected the allegation that WTB had failed to give Kay adequate assurance that his business information would be treated as confidential. 17 FCC Rcd at 1848 ¶ 14; 13 FCC Rcd at 16374 n. 3.

5. The allegedly false statements were not used in either the Kay or Sobel proceedings. 13 FCC Rcd at 16374 ¶ 15.

6. Similarly, the additional alleged examples of a "continuing pattern of animus, discrimination, and selective prosecution" during the years 1999-2003, set forth in Sobel's supplements, filed September 17, 2002, and March 5, 2003, raise no question of potential prejudice in the revocation proceeding. Because we see no need to discuss the merits of the supplements in detail, we will dismiss as moot the Enforcement Bureau's Motion to Strike Supplements to Petition for Reconsideration, filed March 25, 2003, and the Motion for Leave to file supplements, filed May 12, 2003, by Sobel.

instances of seriously improper and unethical (and in some instances potentially illegal) misconduct on the part of Commission personnel and to ask that the Commission fully investigate these matters." Petition for Reconsideration at 2 ¶ 3. Having considered the Request in our Decision, the Commission is aware of Sobel's allegations, which WTB has denied in all respects in an opposition filed March 13, 1998. We deny the Request here, and find that there was no prejudicial staff misconduct. We note, however, that any member of the public has the right to bring alleged staff misconduct to the Commission's attention for a possible internal investigation, even if they do not have standing to challenge a regulatory proceeding where staff misconduct may have led to prejudice or other procedural rights. The Commission will take such allegations extremely seriously, and will determine whether an internal investigation is warranted.

V. ORDERING CLAUSES

14. ACCORDINGLY, IT IS ORDERED, That the Enforcement Bureau's Motion to Strike Supplements to Petition for Reconsideration, filed March 25, 2003, and the Motion for Leave to File Supplements, filed May 12, 2003, by Marc D. Sobel ARE DISMISSED as moot.

15. IT IS FURTHER ORDERED, That the Petition for Reconsideration, filed June 7, 2002, by Marc Sobel, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX C — MEMORANDUM OPINION AND ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION RELEASED MAY 8, 2002

Before the
Federal Communications Commission
Washington, D.C. 20554

WT Docket No. 94-147

In the matter of

JAMES A. KAY, JR.

Licensee of One Hundred Fifty Two
Part 90 Licenses in the
Los Angeles, California Area

MEMORANDUM OPINION AND ORDER

Adopted: May 2, 2002 **Released:** May 8, 2002

By the Commission: Commissioner Martin concurring in part, dissenting in part, and issuing a statement.

1. This memorandum opinion and order denies the Petition for Reconsideration on Behalf of James A. Kay, Jr., filed February 25, 2002[1] and grants the Petition for

1. Also before the Commission is the Enforcement Bureau's Opposition to Petition for Reconsideration, filed March 12, 2002, and the Reply to the Enforcement Bureau's Opposition to Petition for Reconsideration, filed March 25, 2002, by Kay. Because we agree in substance with the Bureau, we will not summarize its arguments in detail.

Reconsideration, filed February 25, 2002, by the Enforcement Bureau.[2] Kay seeks reconsideration of our decision, *James A. Kay, Jr.*, 25 CR 101517 FCC Rcd 1834 (2002)[3] (Decision), which revoked Kay's licenses for several stations in the 800 MHz service. The decision also imposed a $10,000 forfeiture against Kay. The Bureau contends that the Decision should be corrected in minor respects.

I. COMMISSION DECISION

2. The Commission found that Kay violated 47 U.S.C. §308(b) and 47 C.F.R. §1.117 by failing to provide information in response to a letter from the Wireless Telecommunications Bureau, which was investigating complaints that Kay's stations underutilized the frequencies on which he was licensed to operate and that he did not have proper authorization to operate stations on United States Forest Service land. Decision at ¶¶14-15, 40, 50. The Commission found that Kay provided virtually none of the information sought by the Bureau in violation of his obligation as a licensee to respond to Commission inquiries. *Id.* at ¶41. In reaching this conclusion, the Commission examined and rejected Kay's specific and general reasons for not providing the requested information. *Id.* at ¶¶41-49. These included contentions that the Bureau's inquiry was overbroad, that Kay had concerns about whether the Bureau

2. Also before the Commission is James A. Kay , Jr.'s Opposition to the Enforcement Bureau's Petition for Reconsideration, filed March 12, 2002.

3. Commissioner Martin concurring in part, dissenting in part, and issuing a statement.

would respect the confidentiality of the business data it asked for, and arguments that complying with the Bureau's inquiry was unduly burdensome. The Commission noted that if Kay objected to the Bureau's inquiry, he should have sought Commission review. *Id.* at ¶43. Because the Commission did not find that Kay's responses lacked candor, it did not find Kay's misconduct disqualifying. Instead the Commission imposed the lesser sanction of a $10,000 forfeiture. *Id.* at ¶100.

3. The Commission did conclude, however, based on its findings in WT Docket No. 97-56 (adjudicating Sobel's qualifications),[4] that Kay lacked candor in a motion that he filed on January 25, 1995. Kay filed the motion after the Commission designated Kay's stations for hearing to determine whether they should be revoked. The Commission had noted that Kay may have conducted business under a number of names, including "Marc Sobel." Kay sought severance of the Sobel licenses from hearing, supported by an affidavit from Sobel stating:

> I, Marc Sobel, am an individual, entirely separate and apart in existence and identity from James A. Kay, Jr. Mr. Kay does not do business in my name and I do not do business in his name. Mr. Kay has no interest in any radio station or license of which I am the licensee. I have no interest in any radio station or license of which Mr. Kay is the licensee.

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4. Because this issue was relevant to the qualifications of both Kay and Sobel, the then presiding judge in this proceeding made the findings in WT Docket No. 97-56 (in which Kay was made a party) binding here. See ¶¶71, 78.

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> I am not an employer or employee of Mr. Kay, am not a partner with Mr. Kay in any enterprise, and am not a shareholder in any corporation in which Mr. Kay holds an interest. I am not related to Mr. Kay in any way by birth or marriage.

Decision at ¶¶73-74.[5] The Commission concluded that these factual assertions were intentionally false and misleading, since Kay had a considerable interest in some of Sobel's stations under the Management Agreement and that in light of the Management Agreement, it was misleading to say that Kay was not Sobel's partner or employer and that Sobel did not do business in Kay's name. *Id.* at ¶¶92-99.

II. KAY PETITION FOR RECONSIDERATION

4. In his petition for reconsideration, Kay reiterates many of the arguments that he previously made to the Commission, and which we thoroughly considered in our decision. As we have stated: "rehearing will not be granted merely for the purpose of again debating matters on which the tribunal has once deliberated and spoken." *See WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966). We will therefore not discuss Kay's contentions at great length. Certain points, however, warrant discussion.

5. With respect to the 308(b) issue, Kay continues to argue that he had no obligation to respond to the Bureau letter and that he had legitimate reasons for refusing to provide

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5. The motion itself contained substantially the same language. Decision at ¶80.

the information specified by the Bureau. We have, however, thoroughly considered and rejected these arguments in our decision. Decision at ¶¶40-49. There we explained Kay's obligations as a Commission licensee to respond to inquiries and rejected Kay's proffered grounds for not complying with the Bureau's investigation.[6] In this regard, we disagree with Kay's interpretation of *PTL of Heritage Village*, 71 FCC 2d 324, 329 ¶12 (1979), in which the Commission termed compliance with an informal staff investigation "voluntary." The Commission, in rejecting an argument that a staff request to inspect books and records constituted an "unreasonable search" within the meaning of the Fourth Amendment,[7] stated that:

> Section 403 and 409 of the Communications Act provide the Commission the formal means, i.e. subpoena, to obtain books, records and information, but resort to these means in informal investigations has traditionally been unnecessary since most licensees recognize the Commission's authority to inspect such documents. However, when licensees refuse to cooperate in this

6. Thus, for example, Kay complains that the so-called "Thompson Tree Incident" demonstrates that the Bureau was hostile toward him. But if Kay believed that the 308(b) letter was improperly motivated, his recourse was to seek Commission intervention.

7. The Fourth Amendment permits warrantless administrative searches of regulated businesses, where the search furthers a substantial government interest, advance notice is given, and the search is reasonably limited in time, place, and scope. *See Western States Cattle Co., Inc., v. Edwards*, 895 F.2d 438, 441 (8th Cir. 1990).

> voluntary procedure and insist upon formal procedures the Commission will institute a proceeding to obtain the information. Under these circumstances, the Commission does not believe its request of licensees to voluntarily make available information under their control constitutes an unreasonable search under the Fourth Amendment to the Constitution.

71 FCC 2d at 329-30 ¶12. Kay insists that: "if a subpoena issued by the Commission in a formal proceeding requires judicial enforcement, an informal request for information from a low-level Commission employee can not possibly impose a mandatory obligation." Petition for Reconsideration at 5-6. We reject the suggestion that our stated willingness to use our subpoena power, where a licensee does not "recognize the Commission's authority to inspect" documents and insists on the use of formal procedures, means that a licensee may simply refuse to comply with information requests in an informal investigation. Section 308(b) authorizes the Commission to "require" further written statements of fact, not simply to request them. As we stated in our decision, we expect licensees to recognize our authority. Decision at ¶40. The Commission's reference to "voluntary" compliance in *PTL* thus served only to distinguish the formal subpoena process; it did not in any way suggest that licensee compliance with other information requests is optional. The Commission could not carry out its licensing functions without the ability to request and receive information promptly from licensees and applicants. Moreover, if Kay wished to challenge the staff's 308(b) letter,

he could have sought Commission or court review, for example, by requesting, as *PTL* indicates, that the Commission issue a subpoena.[8] He did not do so.

6. Turning to the lack of candor issue, we consider this matter in the memorandum opinion and order, which we adopt today in WT Docket No. 97-56, in which Kay and Sobel jointly assert most of the same arguments that Kay makes here. Two of Kay's arguments, however, are especially germane to the decision in this proceeding. Kay takes issue with the Commission's finding that the lack of candor manifested in the January 25, 1995 motion was consistent with other instances in which Kay was not forthcoming about the stations he managed. Kay maintains that we should not, in this regard, have relied on the testimony of witnesses Carla Pfeiffer and Vincent Cordaro. He also asserts that we should not have considered evidence that Kay crossed out the name of his company on application return notices that he prepared for Sobel, which the presiding administrative law judge (ALJ) excluded as irrelevant. Our decision explains that, while the ALJ questions Pfeifer's "reliability" as to certain matters, he did not question her credibility generally, and neither do we. Decision at ¶97. We did not rely on Cordaro's testimony.

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8. Kay contends that he was deprived of an opportunity to seek review because the Bureau did not issue an "ultimate ruling" on his legal objections but instead recommended that the Commission designate Kay's licenses for hearing. Petition for Reconsideration at 6. The bureau's letters, however, made clear that the Bureau rejected Kay's objections, and Kay does not indicate what further "ultimate ruling" he was expecting. Even aside from the procedure suggested by PTL, and even assuming that the Bureau's letters were not reviewable as of right, Kay could have petitioned the Commission for special relief if he felt that the Bureau's requests were improper.

Id. We also explained that we reversed the ALJ's exclusion of evidence concerning the return notices, since, consistent with precedent, we deemed it relevant to establishing a pattern of conduct in which Kay was not forthcoming about his relationship with Sobel. *Id.*[9]

7. Additionally, Kay faults the Commission for resolving this case without relying on an ALJ's assessment of Kay's and Sobel's credibility. This case is unusual in that evidence regarding the transfer of control and the lack of candor issues were heard by two different ALJ's: Chief Judge Joseph Chackin in WT Docket No. 94-147 and Judge John M. Frysiak in WT Docket No. 97-56. Chief Judge Chachkin found that Kay and Sobel were truthful, while Judge Frysiak reached the opposite conclusion. Decision at ¶¶75-76, 78-79. In view of the fact that two ALJ's, each of whom had an opportunity to observe the witnesses reached contrary conclusions, the Commission, did not defer to either of them in resolving the issues, but rather relied on its own independent review of the full record in both cases. *Id.* at ¶¶86-91. Kay argues that the Commission should have preferred Chief Judge Chachkin's findings over Judge Frysiak's because: (1) Chief Judge Chachkin had a more extensive opportunity to observe the witnesses, since the hearing before him was longer, (2) Chief Judge Chachkin made explicit credibility findings and Judge Frysiak did not, (3) Judge Chachkin was aware of Judge Frysiak's decision

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9. Kay asserts that his "redaction" of his billing address from the return notices was "hardly a clandestine attempt at concealment," since it was obvious to the Bureau that information had been deleted. Petition for Reconsideration at 22. Kay does not, however, explain why he deleted the information.

when he made his own but not vice versa, and (3) Kay was ill[10] during the hearing before Judge Frysiak.[11]

8. We continue to believe, however, that Judge Frysiak's conflicting findings, which are consistent with our own de novo review of the record as a whole, bear on whether Chief Judge Chachkin's findings are supported by substantial evidence. Decision at ¶86, nn. 18-19. As we noted in our decision (Decision at n.18), we indisputably have the power to reject an ALJ's credibility findings in appropriate circumstances and make our own findings in the first instance. We therefore decline to follow Kay's suggestion that the determination involved here: "is not a simple matter of examining the transcripts and exhibits to discern an objective, external fact, and the deliberative processes of the judges may not be ignored in favor of the Commission's own take on a cold record." Petition for Reconsideration at 2. Just as we would not arbitrarily ignore an ALJ's credibility findings, we do not feel justified in ignoring the fact that a conflict exists between two experienced administrative law judges both of whom observed the witnesses. We also believe

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10. Kay submits documentation indicating that, the night before he testified, he was seen at the George Washington University Hospital ER for the treatment of pain resulting from a kidney stone. Petition for Reconsideration, Attachment No. 1. Kay does not contend that his condition affected the content of his testimony. *Id.* at n.5.

11. Kay faults Judge Fysiak for stating that: "Sobel has not offered any proposed findings on the misrepresentation issue." Petition for Reconsideration at 4. Kay admits, however, that Sobel did not file any specific proposed findings and conclusions on the issue, but only replied to the Bureau's findings and conclusions. *Id.*

that the "cold" record in this case contains sufficient circumstantial and testimonial evidence for us to make reliable findings on the material questions of fact. We therefore decline to defer to Chief Judge Chachkin's credibility findings.[12]

III. BUREAU PETITION FOR RECONSIDERATION

9. The Bureau states that the ordering clause of the Commission's decision contains clerical errors. In specifying the sanction to be applied for Kay's lack of candor, the Commission stated:

> Although lack of candor may warrant revocation of all licenses, we believe that it is appropriate to limit the sanction imposed here. In particular, we note that deterrence is an important element of the character qualifications process. *See Character Qualifications*, 102 FCC 2d 1179, 1128 ¶103 (1986). The misconduct found here, concerning Sobel's stations, involves only stations operating on the 800 MHz band. We find that the revocation of Kay's licenses for stations operating on this band will serve as a significant deterrent to future misconduct. Moreover, because we found that the control of Sobel's Management Agreement stations had been transferred to Kay and that Kay shared in the value of these stations, the revocation of these stations also serves to deter future misconduct by Kay as well as

12. Kay also briefly addresses the transfer of control issue as do Sobel and Kay in the Petition for Reconsideration in WT Docket No. 97-56. We address the issue in WT Docket No. 97-56.

> by Sobel. We will therefore limit the sanction applicable to Kay to revocation of the 25 licenses for his stations operating on the 800 MHz band.

Decision at ¶101. The Commission therefore specified the call signs of 25 stations as those to be revoked. These were: WNIZ676, WNMT755, WNVL794, WNVW779, WNWB268, WNWB332, WNWK982, WNWN703, WNWQ651, WNXB280, WNXQ372, WNXQ353, WNXQ911, WNXS450, WNXS753, WNXW280, WNXW549, WNYQ437, WNYR747, WNZY505, WNZZ731, WPAP683, WPAZ639, WPBW517, WNXW487. *Id.* at ¶108. The Bureau asserts that this list reflects two errors. First, the Bureau observes that the number of Kay's licenses at issue is 34 stations not 25. The nine additional stations not listed in the ordering clause are: WNJA910, WNJL306, WNKV762, WNMY402, WNMY773, WNJP874, WNSK552, WNXW327, and WPBZ518. Second, the Bureau states that station WNXQ372 listed in the ordering clause is not licensed to Kay and that the correct call sign of the station licensed to Kay is "WNXG372." The Bureau asks the Commission to correct these apparent oversights.

10. Kay responds that since none of Kay's 800 MHz stations were involved in the Management Agreement, in contrast to Sobel's 800 MHz stations, the Commission has no basis to revoke any of Kay's 800 MHz stations. In any event, Kay argues that the Commission's determination to revoke his 800 MHz stations is arbitrary since the Commission did not explain why the revocation of all of the 800 MHz stations, as opposed to more or fewer stations was mandated by the Commission's character policy. Kay notes

that he was not found totally unqualified to be a licensee and that, even if the Commission did not revoke his 800 MHz stations, the revocation of Sobel's stations and the $10,000 forfeiture would nevertheless serve as sanctions, according to the Commission's own analysis.

11. The Bureau is correct in its belief that the Commission intended to revoke all of Kay's stations in the 800 MHz service and that the deviations pointed out by the Bureau represent inadvertent clerical errors. Decision at ¶101. We will correct the list of stations that are revoked in this memorandum opinion and order. As to Kay's arguments, we recognize that we cannot justify the extent of the sanction here with mathematical precision. Rather, we hope to achieve a reasonable proportionality between the offense and the sanction. Here, we have attempted to take into account both the seriousness with which we view lack of candor, as well as the expectation that, given the deterrent effect of the sanction here, total disqualification may not be necessary. In this regard, making a distinction between Kay's 800 MHz authorizations and his other authorizations seems both reasonable and relevant, since his misconduct was related to the 800 MHz service.

IIV. ORDERING CLAUSES

12. ACCORDINGLY, IT IS ORDERED, That the Petition for Reconsideration on Behalf of James A. Kay, Jr., filed February 25, 2002 IS DENIED.

13. IT IS FURTHER ORDERED, That the Petition for Reconsideration, filed February 25, 2002, by the Enforcement

Appendix C

Bureau IS GRANTED and paragraph 108 of FCC 01-341 IS AMENDED to read:

> 108. IT IS FURTHER ORDERED, That the following licenses of James A. Kay, Jr., ARE REVOKED: WNIZ676, WNMT755, WNVL794, WNVW779, WNWB268, WNWB332, WNWK982, WNWN703, WNWQ651, WNXB280, WNXG372, WNXQ353, WNXQ911, WNXS450, WNXS753, WNXW280, WNXW549, WNYQ437, WNYR747, WNZY505, WNZZ731, WPAP683, WPAZ639, WPBW517, WNXW487, WNJA910, WNJL306, WNKV762, WNMY402, WNMY773, WNJP874, WNSK552, WNXW327, WPBZ518.

FEDERAL COMMUNICATIONS COMMISSON [sic]

Marlene H. Dortch
Secretary

APPENDIX D — MEMORANDUM OPINION AND ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION RELEASED MAY 8, 2002

Before the
Federal Communications Commission
Washington, D.C. 20554

WT Docket No. 97-56

In the matter of

MARC SOBEL

Applicant for Certain Part 90 Authorizations in the Los Angeles Area and Requestor of Certain Finder's Preferences

MARC SOBEL AND MARC SOBEL
D/B/A AIR WAVE COMMUNICATIONS

Licensee of Certain Part 90 Stations in the Los Angeles Area

MEMORANDUM OPINION AND ORDER

Adopted: May 2, 2002 **Released:** May 8, 2002

By the Commission: Commissioner Martin concurring in part, dissenting in part, and issuing a statement.

1. This memorandum opinion and order denies the Joint Petition for Reconsideration on Behalf of Marc D. Sobel and

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James A. Kay, Jr., filed February 25, 2002.[1] Kay and Sobel seek reconsideration of the Commission's decision, *Marc Sobel*, 17 FCC Rcd 1872 (2002)[2] (Decision), which revoked Sobel's licenses and denied Sobel's applications for several stations in the 800 MHz service.

I. COMMISSION DECISION

2. The decision found that Kay and Sobel violated 47 U.S.C. § 310(d) by transferring to Kay without authorization control of 15 stations licensed to Sobel, pursuant to a document entitled "Radio System Management Agreement" (Management Agreement). Decision at ¶¶ 56-58.

3. Additionally, the Commission found that Sobel lacked candor in an affidavit submitted to support a motion, filed January 25, 1995, by Kay. Kay filed the motion after the Commission designated Kay's stations for hearing to determine whether they should be revoked. The Commission had noted that Kay may have conducted business under a number of names, including "Marc Sobel." Kay sought

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1. Also before the Commission is the Enforcement Bureau's Opposition to Petition for Reconsideration, filed March 12, 2002, and the Joint Reply to the Enforcement Bureau's Opposition to Petition for Reconsideration, filed March 26, 2002, by Kay and Sobel. Because we agree in substance with the Bureau, we will not summarize its arguments in detail.

2. Commissioner Martin concurring in part, dissenting in part, and issuing a statement.

severance of the Sobel licenses from hearing and submitted an affidavit by Sobel stating:

> I, Marc Sobel, am an individual, entirely separate and apart in existence and identity from James A. Kay, Jr. Mr. Kay does not do business in my name and I do not do business in his name. Mr. Kay has no interest in any radio station or license of which I am the licensee. I have no interest in any radio station or license of which Mr. Kay is the licensee. I am not an employer or employee of Mr. Kay, am not a partner with Mr. Kay in any enterprise, and am not a shareholder in any corporation in which Mr. Kay holds an interest. I am not related to Mr. Kay in any way by birth or marriage.

Decision at ¶¶ 59-60.

4. The Commission found that this statement lacked candor since Kay had considerable interest in some of Sobel's stations under the Management Agreement and that in light of the Management Agreement, it was misleading to say that Kay was not Sobel's partner or employer and that Sobel did not do business in Kay's name. Examining the record as a whole, the Commission concluded that the statements were intentionally deceptive. Decision at ¶¶ 70-75.

II. PETITION FOR RECONSIDERATION

5. In their petition for reconsideration, Sobel and Kay reiterate many of the arguments that they previously made to the Commission, and which we thoroughly considered in

our decision. As we have stated: "rehearing will not be granted merely for the purpose of again debating matters on which the tribunal has once deliberated and spoken." *See WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966). We will therefore not discuss their contentions at great length. Certain points, however, merit discussion.

6. The petition repeats the argument, made previously, that the Commission could not properly designate the transfer of control and lack of candor issues because it did not give the parties prior notice of the violations and an opportunity to achieve compliance as required by 5 U.S.C. § 558(c). Kay and Sobel further argue that the alleged misconduct could not be deemed to reflect "willfulness," which would exempt it from the notice requirement in section 558(c). In this regard, Kay and Sobel contend that the Commission erred by evaluating the "willfulness" of their conduct by applying the definition of "willful" found in 47 U.S.C. § 312(f)(1), *i.e.*, that the alleged misconduct was "conscious and deliberate." Kay and Sobel argue that the term "willful" "must have a more restrictive meaning, lest the exception apply to virtually any license revocation proceeding under Section 312." Petition for Reconsideration at 5 n. 18. They, however, provide no reason to depart from our view that, consistent with precedent, it is appropriate to refer to the provision of the Communications Act specifically applicable to revocation proceedings to find the most relevant definition of "willful." Decision at ¶¶ 7-8.

7. Kay and Sobel argue at length that the Commission had no basis for finding that the January 25, 1995 motion and the supporting affidavit lacked candor.[3] Noting that such a finding requires a determination that Kay and Sobel manifested deceptive intent, they argue that the record discloses no indication that Kay and Sobel intended to deceive the Commission. Our decision, however, explains in detail why we believe that Kay and Sobel intended to deceive the Commission, and Kay and Sobel do not provide any basis for us to reconsider that determination. Decision at ¶¶ 70-75. For the most part they merely repeat the arguments previously made to the Commission. Thus, we continue to believe that the fact that the hearing designation order dealt mainly with stations other than the Management Agreement stations does not refute the inference that Kay and Sobel intended to mislead the Commission about the latter stations. The record contains evidence that we consider probative of their state of mind, which we discuss in the Decision at ¶¶ 70-75.[4]

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3. We consider an additional argument relating to this issue in ruling on a petition for reconsideration by Kay in our Memorandum Opinion and Order in WT Docket No. 94-147. Kay and Sobel argue that the Commission erred in not relying on favorable credibility findings made by the presiding judge in WT Docket No. 94-147. Since we originally addressed that question in WT Docket No. 94-147, we do so again on reconsideration.

4. Kay and Sobel specifically object to the Commission's finding that Sobel's reference to himself as an "Independent Two Way Radio Dealer" in an earlier letter to the Bureau, which denied that he had a relationship with Kay, was misleading. Petition for Reconsideration at 14. They explain that the term merely indicates that Sobel was not

(Cont'd)

8. In their petition, Kay and Sobel newly assert that the result in this case cannot be reconciled with the result in *Curators of the University of Missouri*, 16 FCC Rcd 1174 (2001), in which, according to Kay and Sobel:

> the Commission found "no evidence of an intent to deceive that would support a finding of misrepresentation or lack of candor" where the licensee's failure to report prior discrimination complaints in its FCC Form 396 (a standard EEO reporting form), even though (1) the Commission rejected the licensee's contention that it was unclear whether the form applied to part time employees; (2) the licensee further failed to disclose the complaints in response to direct correspondence from Commission staff explicitly directing it to identify "any other employment discrimination complaint(s) . . . filed during the current license term"; and (3) the licensee disclosed the complaints only after the matter was called to the Commission's attention in a challenge to the licensee's renewal application.

Petition for Reconsideration at 10.

9. We find no conflict between *Curators* and the present case. In *Curators*, the Commission imposed a forfeiture of $8,000 against the licensee for willfully omitting material facts

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(Cont'd)
affiliated with a radio equipment manufacturer. Our Decision, however, explains why the terminology was misleading in the context it was used. Decision at ¶ 75. We specifically noted that Sobel's own testimony as to what he meant was unpersuasive.

in its submissions to the Commission. 16 FCC Rcd at 1180-81 ¶¶ 25-26. The Commission did not find lack of candor only because the unreported discrimination complaints were resolved favorably to the licensee, which, in the Commission's view, undermined any finding that the failure to disclose was motivated by an intent to deceive. *Id.* at 1180 ¶ 24. Here, by contrast, our decision cited specific facts and circumstances indicating that Kay and Sobel did intend to deceive the Commission. Decision at ¶¶ 70-75.

10. Kay and Sobel also give cursory attention to two additional issues. They note that the evidence regarding the transfer of control issue was heard in both WT Docket No. 94-147 (relating to Kay's qualifications) and in this proceeding, WT Docket No. 97-56 (relating to Sobel's qualifications). They submit that the Commission should take into consideration the presiding judge's findings and conclusions in WT Docket No. 94-147 in resolving the present proceeding. Our decision in this case, however, thoroughly analyzes this issue and Kay and Sobel give us no reason to depart from that analysis. Decision at ¶¶ 12-58.

11. Finally, Kay and Sobel observe that the Commission's decision dealt with Sobel's pleading entitled Revised Request for Inquiry and Investigation, filed February 27, 1998, which alleged that the Bureau committed improprieties in this proceeding. Decision at ¶ 9. The Commission concluded that the matters raised in the pleading had no impact on the resolution of this proceeding and that no further action was warranted. Kay and Sobel observe that the ordering clauses in our decision did not explicitly address the pleading. We will remedy this oversight and deny the request in this order.

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III. ORDERING CLAUSES

9. ACCORDINGLY, IT IS ORDERED, That the Joint Petition for Reconsideration on Behalf of Marc D. Sobel and James A. Kay, Jr., filed February 25, 2002. IS DENIED.

10. IT IS FURTHER ORDERED, That the Revised Request for Inquiry and Investigation, filed February 27, 1998, by Marc Sobel IS DENIED.

FEDERAL COMMUNICATIONS COMMISSON [sic]
Marlene H. Dortch
Secretary

APPENDIX E — CONSOLIDATED SEPARATE STATEMENT OF COMMISSIONER KEVIN J. MARTIN, CONCURRING IN PART AND DISSENTING IN PART

Re: James A. Kay, Jr., Licensee of One Hundred Fifty Two Part 90 Licenses in the Los Angeles, California Area, Memorandum Opinion and Order, WT Docket No. 94-147; *Marc Sobel and Marc Sobel d/b/a Air Wave Communications, Licensee of Certain Part 90 Stations in the Los Angeles Area*, Memorandum Opinion and Order, WT Docket No. 97-56

As I stated in my separate statement concerning our initial decisions in these matters, I disagree with the determinations that James A. Kay, Jr. improperly failed to respond to requests for information and that Kay and Marc Sobel lacked candor in filings they made to the Commission. *See* Consolidated Separate Statement of Commissioner Kevin J. Martin, *James A. Kay, Jr., Licensee of One Hundred Fifty Two Part 90 Licenses in the Los Angeles, California Area*, Decision, WT Docket No. 94-147 (rel. Jan 25, 2002), *Marc Sobel and Marc Sobel d/b/a Air Wave Communications, Licensee of Certain Part 90 Stations in the Los Angeles Area*, Decision, WT Docket No. 97-56 (rel. Jan 25, 2002). Accordingly, for the reasons explained in my earlier separate statement, I would grant in part Kay's and Sobel's petitions for reconsideration and refer this case for a hearing in front of a new ALJ.

APPENDIX F — DECISION OF THE FEDERAL COMMUNICATIONS COMMISSION RELEASED JANUARY 25, 2002

Before the
Federal Communications Commission
Washington, D.C. 20554

WT Docket No. 94-147

In the matter of

JAMES A. KAY, JR.
Licensee of One Hundred Fifty Two
Part 90 Licenses in the
Los Angeles, California Area

APPEARANCES

Robert J. Keller and Aaron P. Shainis on behalf of James A. Kay, Jr.; and Charles W. Kelley, Gary P. Schonman, William H. Knowles-Kellett, John J. Schauble, on behalf of the Wireless Telecommunications Bureau and the Enforcement Bureau, Federal Communications Commission.[1]

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1. The Enforcement Bureau was established effective November 8, 1999. See News Release FCC Reshapes for the Future (Oct. 26, 1999). Its responsibilities include serving as trial staff in formal Commission hearings. It has participated in this proceeding in lieu of the Wireless Telecommunications Bureau beginning in November 1999.

Appendix F

DECISION

Adopted: November 20, 2001 **Released:** January 25, 2002

By the Commission: Commissioner Martin concurring in part, dissenting in part, and issuing a statement.

I. INTRODUCTION

1. This decision modifies an Initial Decision by Chief Administrative Law Judge Joseph Chachkin concluding that James A. Kay, Jr. is qualified to remain the licensee of 152 Part 90 land mobile stations. *James A. Kay, Jr.*, FCC 99D-04 (ALJ Sept. 10, 1999). We find that Kay failed to respond to Commission inquiries and filed a pleading that lacked candor. We will therefore revoke Kay's stations in the 800 MHz band and assess a forfeiture of $10,000 against Kay.

II. BACKGROUND

2. On December 13, 1994, the Commission designated this proceeding for hearing to determine whether Kay, a licensee of land mobile radio facilities under Part 90 of the Commission's rules, has complied with those rules and whether he possesses the character qualifications to remain a Commission licensee. *James A. Kay, Jr.*, 76 RR 2d 1393", *modified*, 11 FCC Rcd 5324 (1996). Kay was ordered to show cause why his licenses should not be revoked or cancelled, why he should not be ordered to cease and desist from certain violations of the Communications Act, and why an order for forfeiture should not issue.

3. The Commission had received numerous complaints about Kay's operations, including allegations that he was falsely reporting the number of mobile units he serves in order to avoid the channel sharing and recovery provisions of the rules. *James A. Kay, Jr.*, 10 FCC Rcd at 2062 ¶2. On January 31, 1994, the Bureau, pursuant to 47 U.S.C. §308(b), served Kay with a letter of inquiry requesting him to provide certain information, including information about the loading of his stations. *Id.* at 2063-64 ¶¶6-7. After an exchange of correspondence and extensions of time, the Bureau, on June 10, 1994, repeated its request. Kay responded on June 24, 1994 that: "[T]here is no date . . . for which the submission of the requested information would be convenient." *Id.* at 2064 ¶8. The Commission thereupon designated this case for hearing. *Id.* Of the eight issues originally designated, four remain before us:

> a) To determine whether James A. Kay, Jr. has violated Section 308(b) of the Act and/or Section 1.17 of the Commission's Rules by failing to provide information requested in his responses to Commission inquiries;
>
> . . . .
>
> c) To determine if Kay has willfully or repeatedly violated any of the Commission's construction and operation requirements in violation of Sections 90.155, 90.157, 90.313, 90.623, 90.627, 90.631, and 90.633 of the Commission's Rules;

> d) To determine whether [Kay] has abused the Commission's processes by filing applications in multiple names in order to avoid compliance with the Commission's channel sharing and recovery provisions in violation of Sections 90.623 and 90.629;
>
> . . . .
>
> g) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether [Kay] is qualified to remain a Commission licensee. . . .

4. This matter was originally assigned to Administrative Law Judge Richard L. Sippel, who, following further proceedings, issued a summary decision in which he revoked Kay's licenses and ordered Kay to forfeit $75,000. *James A. Kay, Jr.*, 11 FCC Rcd 6585 (ALJ 1996). That decision was subsequently vacated and the proceeding was remanded for a full hearing. *James A. Kay, Jr.*, 12 FCC Rcd 2898 (OGC 1997). After the remand, Judge Sippel added a further issue against Kay based on findings made in another proceeding (WT Docket No. 97-56), that an individual named Marc D. Sobel had transferred control of several Part 90 stations to Kay without Commission authorization and that he made misrepresentations and lacked candor. *James A. Kay, Jr.*, FCC 98M-15 (Feb. 2, 1998). *See* Paragraph 71, *infra.* On October 19, 1998, the Commission ordered the appointment of a new administrative law judge to preside over this case. *James A. Kay, Jr.*, FCC 98-274 (Oct. 19, 1998). Then-Chief

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Administrative Law Judge Joseph Chachkin (ALJ)[2] appointed himself to preside. *James A. Kay, Jr.*, FCC 98M-122 (Oct. 30, 1998).

5. In his Initial Decision (ID), the ALJ concluded that the Bureau failed to demonstrate any misconduct by Kay that would warrant revocation of his licenses. ID at ¶223. On the contrary, the ALJ strongly faulted the Bureau's own conduct, finding:

> This Judge has never seen prosecutorial misconduct of this magnitude in the twenty years he has presided over Commission cases. Such misconduct can not be countenanced. It is completely contrary to the Commission's duty and responsibility to treat all of its licensees in a fair and evenhanded manner.

ID at n. 49.[3]

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2. Chief Judge Chachkin retired from the Commission on October 31, 1999.

3. In James A. Kay, Jr., 13 FCC Red 16369 (1998), pet. For recon. Dismissed, 14 FCC Red 14 FCC Red 1291 (1998), we considered Kay's allegations of "prosecutorial misconduct" against the Bureau. Without endorsing all aspects of the Bureau's conduct, we found that Kay had not shown that the Bureau's conduct was outrageous or shocking or that Kay had suffered material prejudice. Having reviewed the record of this proceeding, we adhere to this conclusion. We therefore disavow the ALJ's conclusions regarding the Bureau. Similarly, we find no reason to adopt the dissent's suggestion that we remand for new hearings as to this matter.

6. The ALJ found no basis to fault Kay under the §308(b) issue. ID at ¶¶175-81. He found that the Bureau did not allege that Kay's responses to the Bureau's inquiry contained misrepresentations or lacked candor. He further found that (1) the Bureau's inquiry was excessively broad and constituted an impermissible "fishing expedition," (2) that Kay ultimately produced the information requested after designation for hearing, and (3) that Kay had legitimate concerns as to whether the Bureau would keep the sensitive business information requested confidential.

7. The ALJ rejected the Bureau's contention that Kay had underutilized the frequencies on which he was licensed. ID at ¶¶186-98. He found that the Bureau had not shown that Kay was subject to any specific loading requirement. He also found significant flaws in the manner that the Bureau analyzed the evidence in attempting to support its claims.

8. Additionally, the ALJ rejected allegations that Kay abused the Commission's processes by filing applications in multiple names. ID at ¶¶199-207. Although the ALJ found that Kay was involved in filing applications on behalf of four individuals, the ALJ found that Kay had a factual basis for believing that these individuals had a bona fide intention to use the radio facilities applied for. Moreover, the ALJ questioned the credibility of the witnesses against Kay. According to the ALJ, Kay had no motive to acquire facilities in the manner alleged, since he could have legitimately applied for them in his own name.

9. Finally, although the ALJ accepted the conclusion in WT Docket No. 97-56, that Sobel transferred control of the

facilities in question to Kay without authorization, he found no basis for disqualifying Kay. ID at ¶¶209-18. In this regard, he found that Kay did not make any misrepresentation or engage in other deception in connection with the alleged transfer.

10. Now before the Commission are: (1) the Wireless Telecommunications Bureau's Exceptions and Brief, filed October 12, 1999; (2) the Reply of James A. Kay, Jr., to the Wireless Telecommunications Bureau's Exceptions and Brief; and (3) related procedural matters. For the reasons set forth below, we will modify the initial decision. We find that Kay's responses to the Bureau's 308(b) request failed to provide information that he was obligated as a licensee to produce. We also find that Kay filed a pleading concerning Sobel that lacked candor. We will therefore revoke Kay's stations in the 800 MHz band and assess a forfeiture of $10,000 against Kay.

III. PROCEDURAL MATTERS

11. Before turning to the merits of this case, we wish to address two procedural matters. First, Kay contends that the "clear and convincing evidence" standard of proof applies in this case, rather than the more lenient "preponderance of evidence" test. We disagree. Since the Supreme Court's ruling in *Steadman v. SEC*, 450 U.S. 91 (1981), it is well established that the preponderance of the evidence test applies in administrative proceedings. *See Silver Star Communications-Albany, Inc.*, 6 FCC Rcd 6905, 6907 n. 3 (1991); *Fox River Broadcasting, Inc.*, 88 FCC 2d 1132, 1136 n. 9 (Rev. Bd. 1982). *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 395 n. 1 (D.C. Cir. 1985), cited by Kay, does not hold to the contrary.

12. Second, Kay argues that the Bureau's exceptions and brief should be stricken as violating the provisions of 47 C.F.R. §§1.276 and 1.277. According to Kay, the Bureau's pleading lacks a separate statement of the questions of law presented as required by 47 C.F.R. §1.276(a)(2). Moreover, Kay submits that the pleading exceeds the limit of 30 pages[4] because, in addition to 29 pages of text, the pleading has seven pages of attachments. 47 C.F.R. §1.277(c). The Bureau's pleading does not exceed the page limitation. Attachments consisting of materials that factually support exceptions are not counted in determining the page limit. *See Belo Broadcasting Corp.*, 61 FCC 2d 10, 11 ¶4 (1976); *Gross Broadcasting Co.*, 65 FCC 2d 514, 514 ¶3 (Rev. Bd. 1977); 47 C.F.R. §1.48(a). While, the Bureau's pleading does not have a separate statement of the questions of law presented, as required by the rule, a statement does precede the discussion of each individual issue. The Bureau indicates that a "reformatted" pleading could be refiled without exceeding the page limitation. We see no reason to disrupt the proceeding at this point merely to require such a "reformatting."

IV. § 308 ISSUE

13. The ALJ found that Kay operated Part 90 land mobile radio facilities in the Los Angeles, California, area and that he began providing two-way mobile service to others on a commercial basis in approximately 1982-84. He operated a sole proprietorship under the name of Lucky's Two-Way

4. The provisions of 47 C.F.R. §1.277 limits exceptions and briefs to 25 pages. The General Counsel granted the parties a five page extension in this case. James A. Kay, Jr., FCC 99I-19 (Oct. 7, 1999).

Radio. Lucky's sold repeater service, rented repeater site space, and provided technical consulting services. ID at ¶¶8-9. He offered these services through Specialized Mobile Radio (SMR) stations that operated in the 800 MHz band,[5] and through private carrier stations that operated in the 470-512 MHz or "UHF" band. Kay's UHF stations were licensed in the Business Radio Service.[6] ID at ¶84.

14. On January 31, 1994, the Bureau requested, pursuant to 47 U.S.C. § 308(b), that Kay furnish the Bureau various information concerning his licensed facilities. ID at ¶10. The Bureau stated that:

> The Commission has received complaints questioning the construction and operational status of a number of your licensed facilities. Specifically, the complaints allege that numerous facilities licensed to you are on U.S. Forest Service Land, but do not have the requisite permits for such use. The presumption is that those

5. SMR stations are classified as either conventional or trunked. When trunking is used, channel access is controlled by a computer, which gives the user access to the first available channel or places the user in a waiting line to be served. See Amendment of Part 90, 1 CR 2105", "Older Cases">10 FCC Red 7970, 7974-75 ¶¶3-4 (1994); Amendment of Part 90, 60 RR 2d 867, 868 ¶2 (1986).

6. Kay was also the President and sole shareholder of Buddy Corp., which operated under the business name of Southland Communications. Southland was engaged primarily in the sales, service, installation, and maintenance of mobile radios and two-way mobile radio systems. Some, but not all, customers of Lucky's were customers of Southland, and vice versa. ID at ¶8-9.

> facilities were not constructed and made operational as required by the Commission's rules and therefore, the licenses have canceled. In addition, the Commission has also received complaints questioning the actual loading and use of your facilities. The complaints allege that the *licensed* loading of your facilities does not realistically represent the *actual* loading of the facilities, thereby resulting in the warehousing of spectrum. [Emphasis in the original.]

Id.; WTB Exh. 1 (the "308(b) Letter").

15. The 308(b) Letter directed Kay to produce: (1) an alphabetical list of the call signs and licensee names for all facilities owned or operated by Kay or any companies under which he does business, annotated to show which facilities are located on U.S. Forest Service land, (2) the original license grant date for each call sign, the date the facility was constructed and placed into operation, and the type of station, (3) copies of all U.S. Forest Service permits, (4) an explanation for the lack of a U.S. Forest Service permit for any station located on U.S. Forest Service land, (5) a list of all of Kay's customers, including "the user name, business address and phone number, and a contact person" along with the number of mobile units and, for trunked systems, the number of control stations operated by the user, and (6) a list of the total number of mobile units operated on each of Kay's stations, substantiated by business records. ID at ¶11; WTB Exh. 1.

16. Kay's then attorney, Dennis C. Brown, a partner at Brown & Schwaninger, responded on February 16, 1994. Brown sought "written assurance that any information which Kay submits in response to the Commission's request will be held in strictest confidence and will not be disclosed under any circumstances to any person who is not a Commission employee." WTB Exh. 348 at 1. Brown further requested that Kay be afforded immunity from any forfeiture action or criminal prosecution based on any information supplied, and asked that the running of the sixty day response period be tolled pending action on the requests set forth in the letter. ID at ¶15; WTB Exh. 348.

17. The Bureau responded with a letter, dated March 1, 1994, addressed to Brown. The Bureau stated that, pursuant to 47 C.F.R. § 0.459, if Kay wished to have submitted material withheld from public inspection, he would be required to submit such a request concurrently with the submission of the materials. The Bureau further stated that Brown's February 16, 1994, letter did not comply with 47 C.F.R. § 0.459 and therefore "is not considered a request that information submitted . . . be withheld from public scrutiny." The request for immunity was denied on the grounds that "Congress has not provided for immunity when responding to [Section 308(b)] requests." The deadline for responding to the 308(b) Letter was extended to April 14, 1994. ID at ¶16; WTB Exh. 349.

18. On April 7, 1994, Brown wrote two letters to the Bureau. In the first letter, Brown specifically requested confidential treatment pursuant to 47 C.F.R. § 0.459. Brown sought confidential treatment to prevent an unwarranted

invasion of privacy in that Kay was submitting (via Brown's second April 7 letter) personal information, such as the extent of his resources and how his business was affected by a recent earthquake. Brown also requested confidentiality on competitive grounds. The letter specifically advised the Bureau that some of Kay's competitors obtained copies of the 308(b) Letter and used it to disparage Kay's reputation in the radio communications service market. Brown expressed concern that Kay's competitors would obtain the information which he is submitting and distribute it in an effort to disparage Kay among his customers, and would use the information to probe for weaknesses in his business strategy, and to solicit his current customers directly. ID at ¶17; WTB Exh. 2.

19. In the second letter dated April 7, 1994, Brown addressed the substance of the 308(b) Letter. He presented a number of legal objections and challenges to the scope of the request and provided none of the requested information. In response to item (1), he asserted that the Commission already knew the call signs of Kay's stations and declined to "duplicate that information" or perform "secretarial sorting tasks" that the Commission could "more expeditiously" perform itself. WTB Exh. 3 at 1. He denied that the Commission had jurisdiction to inquire into the status of Kay's U.S. Forest Service Permits, and suggested that the Commission could "plot each station on a map" if it desired to ascertain which facilities were located on U.S. Forest Service Land. *Id.* As to item (2), he asserted that the Commission records already showed the dates the licenses were granted, and that Kay was not required to keep any records of when they were constructed. Addressing items (3)

and (4), he declined to provide information about Forest Service permits, claiming that such information was irrelevant to the Commission's jurisdiction and that a presumption that facilities lacking a permit were not constructed was unreasonable. ID at ¶18; WTB Exh. 3.

20. As to item (5), Brown characterized the Bureau's request for customer lists and usage data as "an unlawful fishing expedition," since it was not directly related to specific complaints. WTB Exh. 3 at 5. He denied that Kay was required to maintain any record of user names or of the other information about users that was requested. He complained that the Bureau's March 1, 1994 letter (paragraph 17, *supra*) did not provide the requested confidentiality. Brown also asserted that item (6) essentially required Kay to "tell the Commission everything about everything" and complained that the March 1 letter declined to provide Kay with immunity. WTB Exh. 3 at 4. He further protested that the request did not specify the time frame for which the data was to be supplied and that, in any event, the usage of Kay's facilities fluctuated over time. For that reason, and because many of Kay's customers had access to multiple facilities, Brown maintained that Kay might not know the number of mobile units in operation on each station. Additionally, Brown asserted that Kay was not required by the Commission's rules to supply loading information except in connection with certain applications and that Kay had provided such information when appropriate. Brown also deemed the request unduly burdensome in light of local conditions, since Kay was still recovering from the Northridge Earthquake, which occurred on January 17, 1994 and severely damaged Kay's home and business, and since

he was adversely affected by the difficult economic conditions in the Los Angeles market. ID at ¶19-20; WTB Exh. 3.

21. Thereafter, on May 11, 1994, the Bureau responded with a letter addressed directly to Kay. The Bureau told Kay that it required answers to the Bureau's January 31 letter in order to act on several pending applications and that these applications would be dismissed unless Kay responded within 14 days. The letter also noted that the April 7 responses contained copyright notices at the bottom.[7] The Bureau told Kay that if he claimed copyright protection he would be required to file 50 copies of his response and justify why the copyright laws apply. ID at ¶24; WTB Exh. 4.

22. Brown replied on May 17, 1994. He specifically challenged the Bureau's request for 50 copies, which is more than required by section 1.51 of the Commission's rules. See 47 C.F.R. §1.51. He stated: "Since the Commission could not possibly require 50 copies for its own internal use, the only reasonable conclusion is that the Commission intends to make further circulation of Mr. Kay's response beyond the Commission." With respect to the copyright notice on Kay's response, Brown stated that the notice was intended to prevent distribution of the response outside of the Commission, but otherwise declined to "advise the Commission as to its obligations under the law of copyright." ID at ¶26, WTB Exh. 5 at 2. Brown also reiterated some of

7. The notice, included at the bottom of each page of several of Brown's letters, stated: "Entire contents copyright, James A. Kay, Jr., 1994. All rights reserved. No portion of this document may be copied or reproduced by any means.

the same legal objections to the 308(b) Letter that he had set forth in the second April 7, 1994, letter. Brown complained that the Commission had declined to furnish him with information about specific complaints under the Freedom of Information Act and suggested that progress could be made on the matter if the Bureau would request specific information concerning each of the specified facilities. He further complained that the Bureau had no justification for threatening to dismiss Kay's applications to get information. ID at ¶27; WTB Exh. 5.

23. The Bureau thereupon, on May 20, 1994, responded to Brown's April 7, 1994, letters. The Bureau characterized Brown's April 7 letter as "inadequate, evasive, and contrived to avoid full and candid disclosure to the Commission." WTB Exh. 6 at 1. The Bureau called it "a studied effort to avoid producing any information." *Id.*; ID at ¶28. The Bureau stated that:

> With respect to Kay's request that information provided to the Commission in response to our inquiry be withheld from public inspection, we will not make those materials which are specifically listed under the provisions of [the Commission regulations implementing the Freedom of Information Act] routinely available for inspection to the public. Therefore, materials which include any information containing trade secrets or commercial, financial, or technical data which would customarily be guarded from competitors, will not be made routinely available to the public.

WTB Exh. 6 at 1. The Bureau specifically responded to an allegation, made in Brown's first April 7 letter, that

the Commission had improperly disclosed confidential information about an individual named Joe Hiram. The Bureau observed that Hiram had consented to the release of the information and that Brown & Schwaninger had been so informed. The Bureau clarified its January 31 request to indicate that Kay should provide loading information as of January 31, 1994 and extended the response date to June 3, 1994. *WTB Exh. 6.*

24. On May 25, 1994, Brown made a further response asking the Bureau to "clarify" its request by specifying the facilities involved in specific complaints. He suggested that Commission employees could inspect relevant records at Kay's office. He also suggested that: "[t]he Commission might want to scrutinize the complaints to assess the likely validity of each item in light of its knowledge of the credibility of the complaining parties and in light of its knowledge of the benefits of which they may hope to gain by harassing Mr. Kay." WTB Exh. 7 at 2. He proposed that "While Mr. Kay might not be convinced that the complainants had presented a *prima facie* case . . . Mr. Kay would not need to raise such procedural objections were the Commission to clarify its request as suggested." WTB Exh. 7 at 2. Brown asked the Commission to defer the response date until 14 days after the conclusion of Kay's FOIA litigation seeking to obtain copies of the complaints against him. ID at ¶¶38-39; WTB Exh. 7.

25. On the next day, May 26, 1994, the Bureau issued a short letter summarily rejecting the request for clarification, stating:

> The Commission's request asks for basic information that Mr. Kay would have readily available if he is

> indeed providing communication services to customers. In fact, such information would be a necessity in order to even issue monthly bills to users of the many systems for which he is apparently licensed.

The Bureau refused to extend the response date beyond June 3. ID at ¶40; WTB Exh. 8.

26. Brown responded to the Commission the same day. Brown again sought "clarification" of items in the January 31 308(b) Letter. With respect to specific items, he asked for the following clarifications: (1) what licensee information the Commission did not possess, (2) what information about the grant and construction of the licenses the Commission did not have, (3) and (4) the relevance of the Forest Service permits, and (5) whether the Commission would keep Kay's user information confidential. As to item (6), Brown did not seek further clarification, but stated that "Mr. Kay states that his business records substantiate that a total of in excess of 7,000 mobile units and control stations operate in association with all of the facilities which he and his companies own and operate." WTB Exh. 10 at 3. Brown urged that a failure to provide further information did not warrant a revocation proceeding. ID at ¶40; WTB Exh. 10.

27. The following day, May 27, 1994, the Bureau answered that no clarification was required. ID at ¶40; WTB Exh. 10. The Bureau further stated:

> Regarding the request for user information, we have no intention of disclosing Mr. Kay's

> proprietary business information, such as customer lists, except to the extent that we would be required by law to do so. Our intent is not to divulge Mr. Kay's proprietary business information to competitors or any non-Commission personnel . . . .

WTB Exh. 10 at 1. The Bureau termed Brown's answer to item (6) "ludicrous" and "frivolous." *Id.* at 1-2.

28. On June 2, 1994, Brown again responded to the Bureau. As to item (1), Brown explained that Kay, in addition to holding licenses in his own name, had an interest in two closely held corporations, Buddy Corp. and Oat Trunking Group, Inc., and that Kay "does not operate any station of which either he or the two above named corporations is not the licensee." WTB Exh. 11 at 1. The letter further explained that Kay did not hold any license that the Commission would not already have in its own records. ID at ¶43; WTB Exh. 11.

29. Brown also renewed his various legal objections to the Bureau's request for information regarding Kay's U.S. Forest Service permits, including relevancy and the Bureau's refusal to disclose the particulars of the alleged complaints against Kay. Brown claimed that there is no requirement that Kay maintain records of license grant dates, that the Commission already had the license grant dates in its own records, and, to the extent Commission rules required Kay to report construction completion dates, he had already done so at the appropriate times. ID at ¶43; WTB Exh. 11. Brown stated that: "Had any license held by Mr. Kay cancelled

automatically because he failed to construct an authorized station in a timely manner, we respectfully submit that such an automatic action of law could not, in any way, raise a question concerning his qualifications to be a Commission licensee." ID at ¶43; WTB Exh. 11 at 3.

30. In response to the Bureau's request for Kay's loading numbers, Brown again stated that Kay's combined systems served a grand total of 7,000 units, but he asserted that providing specific loading information as of January 31, would not prove or disprove any complaint the Bureau may have received, because the systems were in continual churn with customers being added and deleted all the time. Brown again claimed that loading was not a factor as to any of the specific pending applications. ID at ¶44; WTB Exh. 11.

31. Brown once again stated that Kay was not "convinced that the Commission would keep confidential any information that the Commission requested." WTB Exh. 11 at 5. Brown again cited Bureau's unexplained request for 50 copies of Kay's response. Brown submitted only the number of copies of his June 2, 1994, letter required by 47 C.F.R. §1.51. He also included the copyright notice across the bottom of each page. ID at ¶45; WTB Exh. 11.

32. Finally, Brown asserted that the Bureau's refusal to disclose the complaints on which the 308(b) Letter was based, its refusal to postpone the response date until a court resolved Kay's FOIA litigation, its refusal to grant Kay criminal immunity, and its stated intention to initiate hearing proceedings against Kay violated Kay's constitutional rights. ID at ¶46; WTB Exh. 11.

33. The Bureau sent Brown a responsive letter on June 10, 1994. The Bureau labeled Kay's response "woefully inadequate" and threatened that it "places Mr. Kay in jeopardy of Commission sanctions which include revocation of licenses, monetary forfeiture, or both." WTB Exh. 12 at 1. The Bureau stated that any information submitted would be kept confidential and dropped its demand for 50 copies of any response, requiring only 1 original and 1 copy. The Bureau again claimed that loading information was readily available to Kay and required a further response by July 1. The Bureau indicated that it would accept a user list as of any date "*convenient to Mr. Kay*." WTB Exh. 12 at 1. [Emphasis in the original.] ID at ¶47; WTB Exh. 12.

34. On June 17, 1994, Brown wrote to the Bureau, informing it that a Federal District court had required the Commission to submit a "Vaughn Index" of documents withheld from Kay's FOIA request. Brown requested that Kay's disclosure date be extended until 30 days after conclusion of the FOIA litigation. D at ¶48; WTB Exh. 13. The Bureau refused on June 22, 1994, noting that it had released over 1,000 documents to Kay. The Bureau characterized Brown's requests as "dilatory tactics" that exposed Kay to the threat of revocation. ID at ¶49; WTB Exh. 14 at 1. Finally, on June 30, 1994, Brown responded again. As to each of the specific items in the 308(b) Letter, Brown referred the Bureau to earlier responses filed on behalf of Kay. Brown reiterated his legal objection on the ground that the specifics of the alleged complaints had not been disclosed to Kay. He stated that: "Mr. Kay respectfully reports that there is no date subsequent to January 31, 1994 for which the submission of the requested information would be convenient." WTB Exh. 15 at 3.

35. The ALJ found that Kay's responses did not violate either 47 U.S.C. §308(b) or 47 C.F.R. §1.17. He found that the Bureau had not alleged that Kay's responses constituted misrepresentations or lacked candor. ID at ¶¶175-76. He criticized the Bureau's 308(b) Letter as exceeding the permissible bounds of Commission inquiry, as defined by *Stahlman v. FCC*, 126 F.2d 123 (D.C. Cir. 1942), in that they did not specifically inform Kay of the conduct in question and narrowly focus to obtain necessary information. ID at ¶177-79. The ALJ held that, instead, the Bureau had engaged in a "fishing expedition with the hope that something would turn up." ID at ¶179. He faulted the Bureau for not explaining particular complaints, for requiring sensitive information, such as customer lists and technical configurations, and for ignoring Kay's requests for modification. He said that Kay's actions cannot be viewed as an "act of defiance." ID at ¶ 179. The ALJ also found that Kay disclosed nearly 36,000 documents during discovery and that Kay's ability to respond to the 308(b) Letter had been impaired by his limited computer capabilities and the aftereffects of the Northridge earthquake. The ALJ also found that Kay had legitimate concerns about whether data would be kept confidential. These included the breadth of the Bureau's request, the Bureau failure to provide requested assurances, its demand for 50 copies of responses, and an incident in which the Bureau apparently frustrated a finder's preference request filed by Kay. ID at ¶¶180-81.

36. The Bureau challenges the ALJ's adverse findings. The Bureau denies that the 308(b) Letter constitutes an unlawful fishing expedition. According to the Bureau, the Commission has already indicated its approval of the 308(b)

Letter in the hearing designation order and other rulings in this proceeding. The Bureau asserts that charges of Bureau misconduct are irrelevant to the issues in this proceeding. The Bureau disputes the ALJ's findings that the 308(b) Letter sought excessive detail about Kay's technical operations or that compliance was excessively burdensome. The Bureau asserts that Kay could have complied with the request by furnishing: (1) a chart of call signs and license names, (2) copies of Forest Service permits, (3) a user list showing the number of mobile units for each user, and (4) invoices supporting the loading of Kay's systems on one specified date. The Bureau also takes issue with the suggestion that it should have limited its inquiry to the facilities involved in specific complaints.

37. The Bureau discounts Kay's various excuses for noncompliance with the 308(b) request. The Bureau contends that Kay had no valid concerns about confidentiality, since the Bureau twice assured Kay in writing that sensitive material would be kept confidential. The Bureau also argues that the Northridge earthquake did not justify noncompliance. According to the Bureau, Kay did not rely on the earthquake to justify noncompliance and Kay could have complied despite the earthquake.

38. Kay responds that the Commission intended to permit inquiry into the propriety of the 308(b) Letter and to permit Kay to show that he was aggrieved by the Bureau's conduct. Kay argues that Congress did not intend 308(b) to be a "blank check" for requesting information. He further argues that compliance with a 308(b) Letter is voluntary and that the Commission can issue a subpoena, enforceable in

the federal courts, if it wants to compel disclosure. Kay characterizes the 308(b) Letter as overbroad and excessively burdensome, requiring production of billing records, contracts, and invoices regarding more than 150 facilities. In Kay's view, the Bureau should have limited its requests to the facilities involved in specific complaints.

39. Additionally, Kay cites several mitigating factors. He observes that he provided some 38,000 documents after designation for hearing, which demonstrates that he had no intention to deceive the Commission. He asserts that the Bureau gave him ample reason to be concerned about confidentiality, especially in light of its apparent bad faith and animosity towards Kay. Kay asserts that the Northridge earthquake severely disrupted his business, personal life, and computer system, making it difficult for him to comply with the request. In this regard, he submits that compliance with the request required three months of staff time.

40. We find that Kay violated his obligations under 47 U.S.C. §308(b) and 47 C.F.R. §1.17. Licensees have an obligation to respond to Commission inquiries. *See Fox Television Stations, Inc.*, 10 FCC Rcd 8452, 8508 ¶139 (1995). *See also* 47 C.F.R. §1.17 ("The Commission or its representatives may, in writing, require . . . written statements of fact. . . . No applicant, permittee or licensee shall in any response to Commission correspondence or inquiry . . . make any . . . willful material omission bearing on any matter within the jurisdiction of the Commission.") We recognize that a licensee must be free to assert a principled basis for resisting requests for information, such as a contention that the information is privileged or that production would be

unduly burdensome. However, a licensee's belief that the request is immaterial under its own interpretation of law is not a sufficient basis for failing to answer questions. *Fox Television Stations, Inc.*, 10 FCC Rcd at 8508 ¶¶138-39. "The Commission is not required to bargain with its licensees for the information to which it is entitled in order properly to carry out its functions." *Carol Music, Inc.*, 37 FCC 379, 384 (1964). Although the Commission has the authority to seek information by formal means, such as subpoena, where necessary, the Commission expects its licensees to recognize its authority and to cooperate with staff-conducted informal investigations. *See PTL of Heritage Village*, 71 FCC 2d 324, 329 ¶12 (1979). *See also RKO General, Inc. v. FCC*, 670 F.2d 215, 229 (D.C. Cir. 1981) ("As a licensing authority, the Commission is not expected to 'play procedural games with those who come before it in order to ascertain the truth'. . . . license applicants may not indulge in common-law pleading strategies of their own devise"). Moreover, the failure to provide information known to be relevant or a failure to respond based on a facially implausible theory may constitute lack of candor. *Fox Television Stations, Inc.*, 10 FCC Rcd at 8508 ¶¶137.

41. Kay's responses to the Bureau's inquiries disclosed virtually none of the information requested. He failed to provide a list of calls signs based solely on his belief that the Bureau should look up the information itself and because he declined to perform "secretarial sorting tasks." WTB Exh. 3 at 1. He declined to provide information about which of his facilities were located on Forest Service land and whether he had permits for the use of such land, based on the unavailing theory that the Commission lacked authority

to inquire whether a licensee has obtained necessary governmental authorizations, such as permits from the U.S. Forest Service. In fact, the Commission clearly has jurisdiction to determine whether licensees are violating federal permit requirements and whether the licensees have constructed facilities without authorization. The case cited by Kay, *Fort Collins Telecasters*, 103 FCC 2d 978, 980-81 ¶3 (Rev. Bd. 1986), does not hold, as Kay asserted in his response (WTB Exh. 3 at 2), that governmental consent to operation of a facility on its land was irrelevant; it holds that the applicant in that case had demonstrated reasonable assurance of obtaining such consent. *See also Arizona Number One Radio, Inc.*, 103 FCC 2d 550, 553-54 ¶¶3-4 (Rev. Bd. 1976). In any event, as noted above, Kay's unilateral belief that the information is not relevant does not justify nondisclosure. His suggestion that "if the Commission desires to ascertain [which facilities are located on U.S. Forest Service land], we respectfully suggest that it may desire to plot each station on a map which shows the boundaries of the U.S. Forest Service land" was inconsistent with the licensee's responsibilities and likely intended to be sarcastic rather than a legitimate suggestion.[8] Equally unavailing is Kay's response that he was not required to maintain certain

8. We are similarly troubled by Kay's response to the Bureau's request that he explain the applicability of the copyright law to his use of a copyright notice on his correspondence. Kay's former attorney responded: ". . . we must respectfully decline to advise the Commission concerning its obligations under the law of copyright. We can, if the Commission requests, refer the Commission to a firm which practices in the field of copyright and with whose services some of our clients have expressed satisfaction." WTB Exh. 5 at 2. This response is anything but "respectful."

records, such as documentation of grant dates. WTB Exh. 3 at 2. Investigations frequently require examination of material not required to be maintained by Commission rules. *PTL of Heritage Village*, 71 FCC 2d at 327 ¶8.

42. Kay's failure to provide this information, as well as that regarding customers and loading was also based on three more general rationales: (1) the argument that the requests were overbroad because they were not based on specific complaints, (2) concerns over confidentiality, and (3) issues regarding the burden and practicality of providing the information. We disagree with Kay and with the ALJ's treatment of these factors.[9] As to the first issue, both Kay and the ALJ rely on the following dictum in *Stahlman v. FCC*, 126 F.2d 124, 128 (D.C. Cir. 1942), as indicating that the Bureau's inquiry was impermissibly broad:

> . . . [W]e do not mean to hold or to suggest that the Commission is authorized to require appellant or other witnesses whom they may summon to bare their records, relevant or irrelevant, in the hope that something will turn up . . . but only that the Commission may, without interference, seek through an investigation of its own making information properly applicable to the legislative standards set up in the [Communications] Act.

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9. The dissent asserts that the Commission should defer to Judge Chachkin's findings regarding the adequacy of Kay's responses to the Bureau's 308(b) letter of inquiry. We, however, disagree with the legal standards applied by Judge Chachkin in evaluating Kay's responses and therefore find that deference is unwarranted.

43. We do not read that case as saying that the Commission may only seek information relevant to specific complaints. We believe that it is reasonably within our discretion (and the Bureau's) to determine that the existence of numerous complaints about a licensee may warrant a broad investigation of that licensee's compliance. *See Tidewater Radio Show, Inc.*, 75 FCC 2d 670, 677 ¶15 (1980) (". . . full authority and power are given to the Commission to institute an inquiry on its own motion, with or without complaint, as to any matter falling within its jurisdiction. [Footnote omitted]. *See Stahlman*. . . . "). In any event, as noted above, Kay's unilateral belief that the Bureau's inquiry was overbroad did not justify a failure to respond. If Kay objected to the scope of the Bureau's inquiry, he should have sought Commission review, as he did following designation for hearing. *See James A. Kay. Jr.*, 13 FCC Rcd 16369 (1998).

44. We also disagree with the ALJ's treatment of confidentiality. The Commission's rules provide procedures under which a person submitting information may request confidentiality. 47 C.F.R. §0.459. These rules do not, however, authorize a person to withhold information from the Commission on that basis. *See* 47 C.F.R. §0.459(e) (where the Commission denies a request for confidentiality, the person submitting the information may request its return only if the material was submitted absent any direction by the Commission). Thus, Kay's concerns about confidentiality did not justify withholding information. In any event, the Bureau twice expressly granted Kay's request for confidentiality. WTN Exh. 6 at 1-2; WTB Exh. 10 at 1. The ALJ's extensive analysis of Kay's doubts about the Bureau's intention to provide confidentiality (ID at ¶¶16, 23-37, 45, 181) are beside

the point. Whatever doubts Kay might have had did not justify nondisclosure. As noted, Kay should have sought Commission intervention if he desired to pursue this issue.

45. As a related matter, Kay provides no support for justifying the withholding of information because the Commission did not grant him immunity from criminal prosecution or forfeiture. Kay's lawyer stated:

> In view of the reason stated by the Commission [*i.e.*, to determine Kay's qualifications to be a licensee] . . . please also assure us in writing that the information requested will be used solely to determine whether Mr. Kay is qualified to be a licensee and that submission of the requested information will immunize Mr. Kay against any forfeiture action by the Commission or any criminal prosecution."

Kay did not claim, however, that providing the requested information would, in fact, subject him to criminal prosecution in violation of his Fifth Amendment right against self-incrimination. *See Lefkowitz v. Cunningham*, 431 U.S. 801, 805 (1977) (the state may not compel testimony by threatening to impose administrative sanctions unless the constitutional privilege against self-incrimination is surrendered). He therefore had no foundation for requesting immunity. In any event, the right against self-incrimination applies only to the threat of criminal prosecution and not to administrative or civil action, such as forfeiture. *See United States v. Balsys*, 524 U.S. 666, 671 (1998). Thus, Kay had no basis to request immunity against forfeiture.

46. We reject Kay's suggestion, apparently endorsed by the ALJ,[10] that licensees of the channels in question here are not required to track the loading on their facilities. The provisions of 47 C.F.R. §90.135(a)(5) (1994), in effect at the time,[11] specified that:

> (a) The following changes in authorized stations require an application for modification of license:
>
> (5) . . . for systems operating on non-exclusive assignments in the 470-512 MHz, 800 MHz or 900 MHz bands, a change in the number of mobile transmitters . . . .

47. In retaining this provision for shared channels, such as Kay's, while eliminating it for exclusive channels, the Commission observed that the provision is intended "to maintain the integrity of our licensing records. . . ." *Amendment of Part 90 of the Commission's Rules*, 7 FCC Rcd 6344, 6347 n.40 (1992). It clearly contemplates that the licensee must keep track of the loading on its facilities in order to file the necessary modification applications so that

10. *See, e.g.*, ID at ¶179, in which the ALJ concludes: "Under the circumstances, Kay cannot be faulted for raising legal objections and for failing to provide all of the information sought [involving all of Kay's 152 licenses]. In this connection, the findings establish that Kay did not have the computer capability to provide the Bureau the information it sought." The ALJ thus treated Kay's failure to have a computer system capable of tracking the loading on his stations as a mitigating circumstance.

11. The section was later amended. See Biennial Regulatory Review, 13 CR 120713 FCC Red 21027 (1998).

the Commission's records accurately reflect the availability of the channels. In that same report and order, which eliminated the routine submission of end user lists, the Commission further noted:

> Information regarding eligibility of end users and confirmation of whether a system is really serving those end users or is "paper loading" are important parts of our spectrum management responsibilities. These issues, however, generally arise in the context of compliance action and, in such instances, we obtain information directly from the licensee, pursuant to [308(b)]. . . .

Id. at 6345 n.21. Moreover, for the shared channels involved in this case, it is appropriate to examine "snapshots" of loading on particular days. The six-month averaging rule applicable to trunked SMR stations (47 C.F.R. §90.658) does not apply to conventional stations, because it is necessary to know whether the channels involved are available for shared use. *See Amendment of Part 90 of the Commission's Rules*, 7 FCC Rcd 5558, 5562 ¶24 (1992). It should therefore come as no surprise to Kay or others to be required to produce such documentation. Over the past several years, the Commission has attempted to reduce the routine reporting requirements of its licensees. As a result, operators, such as Kay, do not have to submit annual or other periodic reports of their loading, such as the Commission otherwise might have seen fit to impose in the past. The Commission has made clear, however, that licensees must be able to produce such information when requested. Limiting the demand for such information to situations in which a licensee's

compliance has been questioned represents a reasonable balancing of the need for this information to effectuate the Commission's public interest responsibilities and the burden on licensees of submitting this information.

48. Although Kay's responses raised some legitimate points, such as the need to specify a relevant time period and the practical difficulties involved in assembling large amounts of data, especially in light of the disruption caused by the Northridge earthquake, they do not manifest a good faith intent to provide the requested information. The April 7, 1994 response asserts that as a result of fluctuations in use and other factors: ". . . at any given instant of time, Mr. Kay may not know the number of mobile units operated on each of his stations." WTB Exh. 3 at 5. That response further asserts:

> . . . the Commission's Rules require a licensee to know the loading on a given channel only at the time he requests additional channels or at the time he requests renewal of the authorization . . . . Since the Commission's rules do not require Mr. Kay to know the loading on his stations except at those specified times, we respectfully submit that the Commission is not authorized to request such information . . . .

Id. at 6.

49. On June 3, having been given additional time and clarification, Kay did not give an adequate response. He merely indicated that: "Mr. Kay states that his business

records substantiate that a total in excess of 7,000 mobile units and control stations operate in association with all of the facilities which he and his companies own and operate." WTB Exh. 9 at 3. When the Bureau aptly pointed out that this response was "hardly helpful" (WTB Exh. 10 at 1), Kay declined to supply information as to loading on the specified date of January 31, 1994. He instead complained that the Bureau did not specify the date and facilities involved in each individual complaint and stated that because of the continual churn of customers: "such information would neither prove nor disprove the complaints which served as the expressly stated basis for the [308(b) request]." WTB Exh. 11 at 5. Kay thus refused to provide information on the loading of his systems generally.

50. Kay's failures to give productive responses to the Bureau's inquiries warrant a finding that he acted in a recalcitrant manner in violation of 47 U.S.C. §308(b) and 47 C.F.R. §1.17, and thereby failed to meet his responsibilities as a licensee. We note, in this regard, as did the ALJ, that the Bureau does not make the further case that Kay's responses contained misrepresentations or lacked candor. The Bureau has not demonstrated that Kay's unresponsiveness reflected a conscious intent to conceal known violations of the Commission's technical rules.[12] Accordingly, we do not deem Kay's violations disqualifying. We will discuss the ultimate impact of his violations at paragraph 100, *infra*.

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12. As to the statement in the June 24 letter, that Kay did not operate stations other than those licensed to him, we believe that this matter is best considered in the context of the misrepresentation issue. *See* paragraph 99, *infra*.

Appendix F

V. SYSTEM LOADING ISSUE

51. Of the various issues originally designated concerning the construction and operation of Kay's stations, only the question of Kay's system loading remains before us.[13] The ALJ made findings concerning the legal relevance of system loading, *i.e.*, the number of mobile units operating in connection with a licensed facility. At relevant times, one of the items on an application for a private carrier UHF repeater license or a conventional SMR 800 MHz repeater license requested the number of mobile units to be authorized. ID at ¶85. Thus, Kay filed applications specifying the pertinent number of mobile units. ID at ¶87.

52. The ALJ found that the Bureau submitted into evidence two exhibits (WTB Exhs. 19 and 347) that were intended to document the actual loading of Kay's licensed facilities in contrast to the numbers specified in Kay's applications and licenses. ID at ¶88. The data contained in these exhibits were derived from Kay's computer-based

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13. The ALJ made findings under an issue concerning the timely construction and permanent discontinuance of operation of Kay's facilities. He found that the parties stipulated that 69 facilities licensed under 53 call signs were not in operation as of May 11, 1995 and thus subject to automatic cancellation. ID at ¶¶219-222. See WTB Exh. 290. *See also* Wireless Telecommunications Bureau's Proposed Findings of Fact and Conclusions of Law (WTB PF&C) at 44-46 ¶¶107-08. Kay indicated that these facilities were control stations or secondary base stations, rather than primary base stations. The ALJ accepted the Bureau's suggestion that these facilities be referred to the staff for "appropriate license maintenance." ID at ¶222. PF&C at 111 n.23. He therefore took no other action based on these findings and the Bureau suggests no other action.

billing system. The ALJ found that the billing system did not provide a complete or accurate accounting of the loading on Kay's system. ID at ¶¶88-89, 91-92. Of the 152 call signs at issue in this proceeding, the ALJ made findings as to the specific number of mobiles operating on seven of Kay's trunked SMR systems, which he found to be fully loaded. ID at ¶90. He made no findings as to the specific number of mobiles operating on any of Kay's non-trunked systems.

53. The ALJ rejected the Bureau's assertion that adverse findings should be made against Kay based on 47 C.F.R. §§90.313 or 90.633, both relating to conventional (*i.e.*, non-trunked) facilities. He concluded that these rules do not impose loading requirements per se. ID at ¶¶186-89.

54. According to the ALJ, the record does not show that Kay submitted any application that would have required Kay to provide information as to the loading on a particular channel. The ALJ rejected the Bureau's assertion that Kay did not maintain the information that would be needed to demonstrate loading in the event that he filed such an application. According to the ALJ, Kay could have made such a showing based on his billing system and various paper records, although it was impractical for him to do so for all 152 stations at once, as the Bureau required. ID at ¶190.

55. The ALJ further found that, even assuming that the rules contained a specific loading requirement, the Bureau used invalid means to measure Kay's loading. In the ALJ's view, loading cannot validly be measured based on a snapshot of a single point in time. Rather, loading should be measured based on average loading over a six month period. ID at ¶191.

Moreover, the ALJ found that the Bureau erred in measuring loading based solely on Kay's computerized billing records and ignoring other, paper records that Kay disclosed. The ALJ found that the billing records did not include "loaner" or "demo" units, did not include non-current customers, and did not take into account access to multiple repeater sites. ID at ¶¶88-89, 192-93.

56. Finally, the ALJ found that the Bureau had failed to demonstrate that Kay violated 47 C.F.R. § 90.135, which, in any event, was not mentioned in the Commission's hearing designation order. That section requires certain licensees to modify their licenses to reflect a reduction in the number of mobile units. He held that, for the reasons discussed above, the Bureau failed to make a valid demonstration that Kay's facilities were underutilized. He also held that the Bureau had not shown when Kay was supposed to seek modification of his licenses. ID at ¶¶194-98.

57. The Bureau asserts that the ALJ failed to appreciate the significance of Kay's underutilization of his facilities. The Bureau observes that the channels in question are used on a shared basis. According to the Bureau, it is fundamental to the licensing of shared channels that licensees must not seek to retain unused authorizations. In this regard, the Bureau claims that the data disclosed by Kay indicate that the number of mobile units actually used in connection with his facilities is several thousand less than authorized. The Bureau asserts that the various factors cited by the ALJ do not begin to account for a shortfall of this magnitude, indicating that Kay had no intention of sharing the channels in question. The Bureau maintains that Kay had an obligation under the rules to substantiate the loading on his facilities.

58. Kay replies that the Bureau has not shown when he would be required to amend his authorizations to reflect reductions in the number of mobile units served and argues that he should not be required to amend to show temporary fluctuations in use. He further argues that the Bureau ignores factors that explain the apparent shortfall in utilization, such as economic conditions, the need to consult records other than billing records, and channel sharing.

59. We have no basis to find that Kay violated either 47 C.F.R. §90.313 or 47 C.F.R. §90.633. As the ALJ correctly notes, neither of these rules imposes any specific requirements on licensees. Section 90.313, applicable to the 470-512 MHz band, provides that until a channel is loaded to 90 mobile units it will be available for assignment to other users in the same area on a shared basis. Section 90.633 similarly provides for SMR facilities that where a channel is not loaded to 70 mobile units it will be available for assignment to other users. As the Bureau suggests, the application of these rules requires that the Commission's licensing records accurately reflect whether the channels are loaded to the benchmarks specified in the rules, and thus whether they are available for sharing. The relevant provisions do not, however, contain any language imposing a particular duty on individual licensees in this regard. The Bureau offers no support for its assertion that: "To comply with these rule sections (i.e., §§90.313 and 90.633), a licensee must not seek or retain authorization for unused slots." Wireless Telecommunications Bureau's Exceptions and Brief at 12.

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60. Rather, as discussed in paragraphs 46-47, *supra*, the provisions of 47 C.F.R. § 90.135(a)(5) (1994), which during the relevant time period, required licensees on shared channels to seek modification of license to reflect changes in loading, protected the integrity of the Commission's licensing records in this regard. The Bureau's attempted showing that Kay's actual loading did not conform to that specified in his licenses appears relevant to Kay's compliance with § 90.135. This provision was not, however, included in the hearing designation order, and the Bureau expressly denies that it is attempting to demonstrate a violation of 47 C.F.R. §90.135:

> Contrary to the conclusion at I.D., ¶¶194-195, the Bureau never sought to present evidence to prove a Section 90.135 issue that was never designated. The evidence presented by the Bureau demonstrated violations of Sections 90.313 and 90.633, the rules that require channel sharing. The fact that the Bureau's evidence would also support a showing that Section 90.135 was violated is inconsequential.

Wireless Telecommunications Bureau's Exceptions and Brief at 14 n.10. The difficulty with the Bureau's statement is that the relevant provisions of 47 C.F.R. §§ 90.313 and 90.633 do not impose any explicit requirements on licensees.

61. We decline to consider the issue of Kay's § 90.135 compliance absent the designation of an issue.[14] To do so

14. As our discussion at paragraphs 46-47, supra, suggests, however, we disagree with the ALJ's analysis with regard to Kay's (Cont'd)

would risk depriving Kay of basic due process rights. *See RKO General, Inc. v. FCC*, 670 F.2d 215, 229 (D.C. Cir. 1981) (". . . reasonable notice of a charge and an opportunity to be heard in defense before punishment is imposed are 'basic to our system of jurisprudence. . . .'"). Moreover, 47 U.S.C. § 503(b)(4) requires that forfeitures may be imposed only pursuant to a notice of apparent liability that shall "identify each specific provision, term, and condition of any . . . rule . . . which such person apparently violated or with which such person failed to comply. . . ." We will therefore not address this matter further.[15]

VI. ABUSE OF PROCESS ISSUE

62. The ALJ made findings concerning allegations that Kay filed applications in multiple names to avoid compliance with the Commission's channel sharing and recovery provisions. He found that four individuals testified that Kay had engaged in relevant conduct.

(Cont'd)

obligations under §90.135. We believe that the rules clearly required Kay to track the loading of his facilities and to seek modification of his licenses to reflect changes in loading. We expect Kay to comply with all relevant rules in the future with respect to his remaining UHF stations.

15. Because we do not reach the merits of the loading issue, Kay's Motion for Leave to File Supplement to Reply Exceptions, which seeks to further address this issue, is moot and will be dismissed.

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63. Roy Jensen was a former general manager of Southland from 1990-92. He testified that Kay asked him to sign an application for a land mobile end user license in the name of Roy Jensen dba Consolidated Financial Holdings. Jensen denied that Consolidated Financial Holdings ever operated any radio devices and denies that he intended to operate 37 mobile units, as specified in the application. ID at ¶¶94-96. Kay testified that he intended to help Jensen pursue his own business interests. ID at ¶97.

64. Kevin Hessman was an employee of Southland from 1990-93 and a friend of Jensen's. Hessman testified that Kay and Jensen approached him and asked him to sign some FCC application forms to "help [Kay]. . . ." Hessman claims that the entity specified on the license, Hessman Securities, did not exist and never operated mobiles. ID at ¶¶99-102. Kay testified that Hessman approached him to use radio devices in connection with an off-hours security operation. ID at ¶104.

65. Vincent Cordaro worked for Southland from 1991-95 in various capacities including general manager. He formerly owned his own two-way radio business. In November/December, 1994 Kay and Cordaro entered into a "Radio System Management and Marketing Agreement" under which Kay would manage a repeater station licensed to Cordaro. A few months earlier, in April 1994, Kay filed an application (which was, however, dated November 11, 1992) for the assignment of the repeater station from Cordaro to Kay. Cordaro claimed that Kay induced him to sign a blank application form and did not consent to the assignment. He also testified that Kay had asked him to sign blank forms

on other occasions. ID at ¶¶107-13. Kay participated in filing applications in the name of Vince Cordaro dba VSC Enterprises. Cordaro testified that VSC in fact never used radio devices. ID at ¶¶115-16, 121.

66. Carla Marie Pfeifer and Kay were friends. In 1990, Kay assisted Pfeifer in obtaining a repeater license, pursuant to an arrangement under which Kay constructed the station and marketed its services. Kay and Pfeifer shared in the revenues. A number of documents were entered into evidence that purported to bear Pfeifer's signature, but, as to which, Pfeifer questioned whether the signature was hers. Kay denied signing any document in Pfeifer's name. ID at ¶¶125-30.

67. The ALJ found that Kay had a factual basis for believing that Jensen, Hessman, and Cordaro were engaged in or intend to engage in their own pursuits in which they desired to use radio. ID at ¶ 201. He also questioned the credibility of these witnesses. He found that both Jensen and Hessman made misrepresentations to the Office of Appeals of the California Unemployment Insurance Appeals Board regarding the circumstances of their discharge from Kay's employ. ID at ¶¶98, 106, 202. Additionally, the ALJ found that Cordaro had filed a sworn statement with the Commission in another proceeding inconsistent with his testimony in this proceeding that he was not using radio devices as part of his independent business activities. ID at ¶¶121-22, 202. Although the ALJ did not question Pfeifer's veracity, he nevertheless questioned whether she was a reliable witness because of her vague and incomplete recollection. ID at ¶¶128-29, 203. Additionally, the ALJ found that Kay had not attempted to conceal his involvement in

various applications. ID at ¶204. He also found that the Bureau had not shown that Kay was ineligible to apply for the facilities in question in his own name. Thus, according to the ALJ, the Bureau failed to show that Kay had a motive to abuse the Commission's processes. ID at ¶¶205-07.

68. The Bureau faults the ALJ for discounting the testimony of Jensen, Hessman, Cordaro and Pfeifer. The Bureau suggests that even if there is reason to question their credibility individually, the consistency of their testimony should be taken into account. Moreover, the Bureau asserts that the circumstances indicate that Jensen, Hessman, and Cordaro really did not require radio devices. The Bureau accuses the ALJ of ignoring evidence that Pfeifer and Cordaro were not involved in the management of stations supposedly licensed to them and were simply surrogates for Kay. The Bureau denies that it needed to show a motive for Kay's abuse of process.

69. Kay retorts that the ALJ had ample reason to credit Kay's testimony over that of Jensen, Hessman, Cordaro, and Pfeifer. He denies that he had a motive to abuse the Commission's processes and claims that he made no attempt to conceal his involvement in the various applications. He characterizes the Bureau's position as mere speculation.

70. This issue presents a difficult factual question. In many respects, it boils down to a determination of the relative credibility of Kay and his chief accusers, Jensen, Hessman, and Cordaro. Under these circumstances, the ALJ's findings concerning the relative credibility of witnesses are generally entitled to great weight. *See, e.g., TeleSTAR, Inc.*,

2 FCC Rcd 5, 13 ¶23 (Rev. Bd. 1987), *citing Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074, 1078-80 (9th Cir. 1977) (administrative law judges' factual determinations based on testimonial inferences are entitled to special deference). Here, however, the Bureau correctly points to factors that tend to undermine the ALJ's treatment of this issue. The fact that three independent witnesses testified consistently concerning Kay tends to bolster their credibility. *See Black Television Workshop of Los Angeles, Inc.*, 8 FCC Rcd 4192, 4194-95 ¶19 (1993). Moreover, we are unable to discern the evidentiary foundation for the ALJ's conclusion that "the undisputed record establishes" that Kay had a "factual basis" to believe that Jensen, Hessman, and Cordaro "were engaged in or intended to engage in pursuits beyond the scope of their employment by Kay in which they desired to use Kay's radios and repeaters." ID at ¶201 *citing* Kay's Proposed Findings of Fact and Conclusions of Law at ¶¶95-97, 104, 115. As the Bureau aptly observes, Jensen, Hessman, and Cordaro denied that they had any need for the authorizations applied for, and there is no independent evidence that they did. Tr. 1488, 1797, 1844. Nevertheless, because this issue depends critically on an evaluation of Kay's state of mind, as to which the ALJ's demeanor findings have considerable weight, as well as his conduct, we are reluctant to overturn the ALJ's assessment of Kay's testimony based solely on the circumstances set forth above. Moreover, like the ALJ, we find that the record does not sufficiently demonstrate that Kay had a motive for abusing the Commission's processes in this context. We note, however, that evidence under this issue concerning Kay's agreements with Pfeifer, and Cordaro reflects a pattern of conduct, relevant to the de facto control and misrepresentation issues, and we will consider it in that context.

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VII. DE FACTO CONTROL/MISREPRESENTATION ISSUES

71. Judge Sippel, the original presiding judge in this proceeding, added the following issues:

> To determine, based on the findings and conclusions of *Initial Decision* FCC 97D-13 reached in WT Docket No. 97-56 concerning James A. Kay, Jr.'s (Kay) participation in an unauthorized transfer of control, whether Kay is basically qualified to be a Commission licensee.
>
> To determine whether James A. Kay, Jr. misrepresented facts or lacked candor in presenting a Motion To Enlarge, Change, or Delete Issues that was filed by Kay on January 12, 1995, and January 25, 1995.
>
> To determine whether in light of the evidence adduced under the aforementioned added issues whether James A. Kay, Jr. is qualified to hold a Commission license.

James A. Kay, Jr., FCC 98M-15 (Feb. 2, 1998).

72. In WT Docket No. 97-56, then Administrative Law Judge John M. Frysiak[16] concluded that Marc Sobel was unqualified to be a Commission licensee because he had transferred control of 15 SMR stations to Kay without

16. Judge Frysiak retired on December 31, 1999.

authorization. *Marc Sobel*, 12 FCC Rcd 22879 (ALJ 1997). He found that the transfer occurred pursuant to an arrangement between Sobel and Kay reflected in a document called "Radio System Management Agreement and Marketing Agreement" (Management Agreement). *Marc Sobel*, 12 FCC Rcd at 22899-900 ¶¶65-68. Pursuant to this arrangement, Kay managed the stations, paid the station's construction and operating expenses, and shared the revenues of the stations. Kay also had a purchase option for the stations. The ALJ found based on an analysis of the facts and circumstances surrounding Kay's management of the stations that Kay had ultimate control of the facilities.

73. Judge Frysiak, in the Sobel proceeding, further found that an affidavit executed by Sobel in connection with a Motion To Enlarge, Change, or Delete Issues that was filed by Kay in this proceeding, misrepresented Kay's relationship to the Management Agreement stations. *Marc Sobel*, 12 FCC Rcd at 22900-902 ¶¶69-78. Kay had filed the motion in this proceeding because the Commission had initially included 11 licenses held by Sobel in the hearing designation order in this proceeding (WT Docket No. 94-147), based on the belief that Kay was doing business in Sobel's name. *James A. Kay, Jr.*, 10 FCC Rcd at 2063 ¶3.

74. The affidavit stated:

> I, Marc Sobel, am an individual, entirely separate and apart in existence and identity from James A. Kay, Jr. Mr. Kay does not do business in my name and I do not do business in his name. Mr. Kay has no interest in any radio station or license of which

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> I am the licensee. I have no interest in any radio station or license of which Mr. Kay is the licensee. I am not an employer or employee of Mr. Kay, am not a partner with Mr. Kay in any enterprise, and am not a shareholder in any corporation in which Mr. Kay holds an interest. I am not related to Mr. Kay in any way by birth or marriage.

12 FCC Rcd at 22893-94 ¶51.

75. Judge Frysiak found that the affidavit and pleading did not provide any description of the actual relationship between Sobel and Kay, although it was purportedly prepared in part because Sobel believed that the Commission was delaying the processing of his pending applications due to confusion about the relationship between Sobel and Kay. 12 FCC Rcd at 22894-95 ¶¶52-53. The ALJ rejected as false the statement in the affidavit that Kay had no "interest" in stations or licenses assertedly held by Sobel. The ALJ did not credit Sobel's attempts to reconcile this statement with the fact that Kay owned the stations' equipment, had an option to purchase the stations, and had a stake in the stations' revenues, holding that this arrangement constituted "a fair amount of interest." 12 FCC Rcd at 22895-96 ¶¶56-58, 22901 ¶73. The ALJ concluded that the affidavit was intended to "ward off" the Commission from being apprised of the true nature of the Kay-Sobel business relationship and that it therefore lacked candor. 12 FCC Rcd at 22901 ¶73.

76. Judge Frysiak further found that Sobel also lacked candor both by failing to submit voluntarily the Management Agreement to the Commission and in correspondence with

the Commission. 12 FCC at 22897 ¶62, 22901-02 ¶74. The ALJ therefore revoked Sobel's licenses, denied his applications, and dismissed his finder's preference requests.

77. Based on the foregoing, Judge Sippel held that the issue of control in the Sobel proceeding should not be relitigated in this proceeding and that Kay should be permitted to offer evidence only on the issue of whether his exercise of control over the Sobel stations has an impact on his qualifications to hold a Commission license. FCC 98M-15 at ¶5. As to the issue of misrepresentation, Judge Sippel ruled that the initial decision in WT Docket No. 97-56 raised a substantial question of misrepresentation or lack of candor and provided the factual basis for adding an issue against Kay. *Id.* at ¶¶6-11.

78. In his initial decision in this proceeding, Chief Judge Chachkin observed that the issues as framed did not permit him to make independent findings as to whether the Management Agreement constituted an unauthorized transfer of control.[17] ID at n. 48. In any event, however, the ALJ found that an unauthorized transfer was not disqualifying misconduct unless accompanied by deception. ID at ¶211.

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17. Despite this acknowledgment, Judge Chachkin made 35 paragraphs of findings (ID at ¶¶143-74) that largely overlap Judge Frysiaks's findings in the *Sobel* proceeding, and also questioned the legal standard applied by Judge Frysiak (ID at n.48). Because Kay was a party to the *Sobel* proceeding and had a full opportunity to litigate the transfer of control issue there, we have not set forth Chief Judge Chachkin's duplicative findings at length. In our review of the Sebel proceeding, discussed at paragraph 85, *infra*, we address the question of the relevant legal standard.

He found that in this case Kay did not intend to conceal the Management Agreement, since he voluntarily gave a copy to the Bureau on March 24, 1995, after this case was designated for hearing, in response to a Bureau discovery request. ID at ¶¶165, 213. He also found that Kay and Sobel had been advised by counsel that the Management Agreement complied with FCC requirements. ID at ¶¶161, 213. The ALJ therefore found no basis to impose sanctions against Kay.

79. As to the issue of misrepresentations, Judge Chachkin found that Judge Frysiak's initial decision in the *Sobel* proceeding was "tainted" because the Bureau misrepresented to Judge Frysiak that Sobel did not disclose the Management Agreement until his July 3, 1996 response to a 308(b) letter from the Bureau, and that the Bureau concealed from Judge Frysiak that Kay voluntarily disclosed the Management Agreement to the Bureau during discovery in March 1995. ID at ¶¶168-69, 210.

80. Turning to the specific facts, the ALJ found that Kay's allegedly false statement with respect to this matter occurred in the Motion to Enlarge, Change, or Delete Issues filed by Kay on January 12 and 25, 1995. *See* Paragraph 73, *supra*. Kay's motion states:

> James A. Kay, Jr. is an individual. Marc Sobel is a different individual. Kay does not do business in the name of Marc Sobel or use Sobel's name in any way. As shown by the affidavit of Marc Sobel attached as Exhibit II, hereto, Kay has no interest in any of the licenses or stations held by Marc Sobel. Marc Sobel has no interest in any of the

> licenses or stations authorized to Kay or any business entity in which Kay holds an interest. Because Kay has no interest in any license or station in common with Marc Sobel and because Sobel was not named as a party to the instant proceeding, the presiding officer should either change the HDO to delete the reference to the stations [licensed to Sobel] or should dismiss the HDO with respect to those stations.

ID at ¶170; WTB Exh 343 at 3-4.

81. The ALJ found that Kay understood that his lawyers meant that Kay had no "interest" in the sense that Kay had no legal or ownership interest in the licenses, such as by being a partner. Kay testified that he and his then attorney, Brown, used the terms "license" and "station" interchangeably. ID at ¶171. The ALJ also found that the motion was not primarily intended to address the Management Agreement, since only two of the 11 stations sought to be deleted were Management Agreement stations. Moreover, Kay's lawyer specifically advised him that the Management Agreement did not constitute an "interest." ID at ¶172. The ALJ found that Kay and Sobel testified in a candid and forthright manner. ID at ¶173. Additionally, he found that Kay had disclosed the Management Agreement in March 1995 during discovery. ID at ¶174. The ALJ observed that the Bureau did not seek the addition of a misrepresentation issue against Sobel until April 1997. ID at ¶174, n. 31.

82. The ALJ concluded that Kay had not attempted to deceive the Commission. The ALJ found that Kay believed

that the statement concerning "interest" was accurate and did not attempt to conceal the Management Agreement. In the absence of deceptive intent, the ALJ resolved the misrepresentation issue in Kay's favor. ID at ¶¶214-18.

83. The Bureau observes that the ALJ's treatment of this issue is inconsistent with Judge Frysiak's analysis in the Sobel proceeding. The Bureau claims that Judge Frysiak was aware of the disclosure of the Management Agreement in March 1995, but considered the disclosure outside the relevant time period (since the Management Agreement was not disclosed until two months after Sobel's affidavit was submitted in January 1995). The Bureau contends that the statement that Kay had no "interest" in Sobel's stations is plainly false in light of the financial claims he had under the Management Agreement and that Kay's attempts to reconcile the statement are unpersuasive. The Bureau asserts that Kay had no basis for his claimed reliance on counsel and that he deceitfully intended to conceal his relationship with Sobel from the Commission.

84. Kay maintains that the motion reflects no intent to deceive. According to Kay, the motion merely intended to show that, contrary to the representation in the hearing designation order, Kay did not conduct business in Sobel's name. Kay observes that only two of the 11 stations listed in the hearing designation order were Management Agreement stations. He asserts that arguments over the meaning of the words "interest" and the like are merely quibbles. Kay observes that he disclosed the Management Agreement during discovery and suggests that he would not even have put it in writing if he intended to deceive the Commission. He also

argues that he legitimately relied on advice of counsel. Kay maintains that the Bureau has been disingenuous about his disclosure of the Management Agreement in March 1995.

85. In a companion decision to this one, we have today ruled on exceptions filed by Sobel and Kay to the initial decision in WT Docket No. 97-56. *Marc Sobel*, FCC 01-342 (adopted Nov. 20, 2001) (Decision). Because Kay is a party in WT Docket No. 97-56, he is bound by the determinations made in that proceeding to the extent that they involve findings and conclusions common to the two proceedings. *See Westel Samoa, Inc.*, 11 CR 99313 FCC Rcd 6342, 6346 ¶13 (1998) (doctrine of collateral estoppel). In the *Sobel* decision, we affirmed the ALJ's determination that under the Management Agreement, Sobel transferred de facto control of his facilities to Kay without Commission authorization. We noted that some ambiguity existed as to the applicable standard for determining control in this context and found that the same result obtained under the holdings of both *Intermountain Microwave*, 24 RR 98 (1963) (which we intend to apply in the future) and *Motorola, Inc.*, File Nos. 50705 (PRB 1985) (unpublished). Decision at ¶¶52-59.

86. We further found that Sobel's January 24, 1995 affidavit lacked candor. In this regard, we were not swayed by Chief Judge Chachkin's finding in this proceeding that "Kay and Sobel testified in this proceeding and answered questions put to them in a candid and forthright manner. Their testimony that they did not intend to deceive the Commission concerning their business dealings is entirely candid and is accepted." ID at ¶173. These findings are not entitled to deference (*see* paragraph 70, *supra*) in view of the fact that

Judge Frysiak, who heard essentially the same testimony in the *Sobel* proceeding, clearly did not find these witnesses credible. We believe that the existence of these conflicting findings bears on whether such findings are supported by substantial evidence. *See, e.g., Bauzo v. Bown*, 803 F.2d 917, 922 (7th Cir. 1986). In view of the apparent conflict between the two judges' assessment of the witnesses' credibility, we did not defer to either ALJ but based our decision on our own independent assessment of the nature of the representations made and the circumstances that were involved.[18]

87. In this regard, we do not accept Kay's suggestion that Judge Frysiak's evaluation of the witnesses' credibility should be accorded less weight than Chief Judge Chachkin's because the former's initial decision was "tainted." Kay bases this contention on Chief Judge Chachkin's finding that:

> Judge Frysiak's decision was tainted because the Bureau deliberately concealed the fact that Kay

18. The dissent suggests that a new hearing should be held to allow a new ALJ to make credibility findings. We believe that no further hearing is necessary given the commission's power of de novo review. *See FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 364-65 (1955); *Parker v. Bowen*, 788 F.2d 1512, 1520 (11th Cir. 1986); *Moore v. Ross*, 687 F.2d 604, 609-09 (2d Cir. 1982) (agency has the power to make findings of fact in the first instance and is not bound by the credibility determinations of an ALJ). Moreover, additional hearings would be wasteful and time consuming. No matter how the new ALJ ruled, there would still be conflicting credibility determinations that the Commission would have to resolve. We don't, for example, see a justification for adopting an automatic "majority rules" policy. We therefore choose to exercise our power of de novo review.

> had given a copy of the Management Agreement to the Bureau on March 24, 1995. Thus, in reaching his conclusion, the Judge was unaware of the March 24, 1995 filing and erroneously assumed that the Commission first received a copy of the Management Agreement on July 3, 1996.

ID at ¶169. *See also* ID at ¶210. Chief Judge Chachkin also listed several pleadings and orders, which he found, demonstrated the Bureau's "elaborate scheme" to conceal the March 24, 1995 submission from Judge Frysiak. ID at ¶169.

88. Our examination of the record, however, provides no support for the assertion that Judge Frysiak's decision was "tainted" or that the Bureau engaged in an "elaborate scheme." Initially, we find no reason to believe that Judge Frysiak would have changed his view of Sobel's state of mind based on the March 1995 submission. He had already ruled that the relevant timeframe for determining Sobel's state of mind was when Sobel executed his affidavit in January 1995, not afterwards. Tr. WT Docket No. 97-56 at 297-99. The mere fact that the Management Agreement was produced in discovery in March 1995 thus would not have had material impact on Judge Frysiak's analysis.

89. The record also undercuts the suggestion that the Bureau engaged in an "elaborate scheme" to conceal the March 1995 submission from Judge Frysiak, inasmuch as Sobel himself could readily inform Judge Frysiak of the submission and did so explicitly at least twice during the proceeding. During discovery, Sobel sought the Bureau's admission that: "A copy of the Radio System Management

and Marketing Agreement . . . has been in the possession of the Bureau since 24 March 1995." Sobel's Request for Admission of Facts and Genuineness of Documents by the Bureau, filed March 19, 1997 at 3 ¶7. Judge Frysiak denied Sobel's requested admission as irrelevant, based on the timing of the disclosure.[sic] (*see* paragraph 88, *supra*). *See Marc Sobel*, FCC 97M-57 (Apr. 17, 1997).[19] Later, the Bureau sought the addition of the misrepresentation/lack of candor issue now under discussion. (The hearing designation order in the Sobel proceeding specified only the transfer of control issue.) Sobel argued in opposition that he could not have intended to deceive the Commission because he: ". . . was aware that Kay intended to produce a copy of the agreement in response to Bureau discovery requests and assumed that this had already been done." Opposition to the Bureau's Motion to Enlarge Issues, filed April 21, 1997 at 5 n. 8. Apparently referring to his earlier request for admission, Sobel further stated:

> Sobel has attempted in discovery in this proceeding to determine precisely when the Bureau became aware of and received a copy of

19. The dissent suggests that it is not possible to assess after the fact the potential impact of the March 1995 disclosure on Judge Frysiak's decision. We see no reason, however, to disregard Judge Frysiak's own rulings discounting the significance of subsequent disclosure of the Management Agreement. Moreover, the ultimate question, of course, is not whether Judge Frysiak would have reached a different decision, but whether the record, on review, warrants a different decision. In this regard, as indicated below, our evaluation of the record as a whole is consistent with Judge Frysiak's assessment that Kay and Sobel made intentional deceptive representations about their relationship, notwithstanding the March 1995 disclosure.

> the agreement, but the Bureau has thus far refused to provide such information.

Id. As the request for admission filed a month earlier indicated, however, Sobel already knew the precise date; the Bureau did not conceal it.

90. At the hearing Sobel had the opportunity to testify as to this point. Sobel testified that at the time he signed the affidavit he expected that the Bureau would obtain a copy of the Management Agreement or become aware of it, if they had not already done so. Tr. WT Docket No. 97-56 at 302. Judge Frysiak then asked Sobel whether he filed the Management Agreement with the Commission. Sobel answered that Kay filed it along with the January 1995 motion. Tr. WT Docket No. 97-56 at 303. Sobel's attorney (who represents Kay in this proceeding) stipulated that Sobel was incorrect in this assertion, without mentioning the March 1995 submission. *Id.* Later, Bureau counsel specifically asked Sobel: "when was the first time you provided a copy of [the] management agreement to the Commission." Tr. WT Docket No. 97-56 at 313. Sobel responded: "In reference to the Commission's request for information under 308(b)." *Id.* Sobel's attorney (Kay's here) stipulated that the date was July 3, 1996, again without mentioning the March 1995 submission. Tr. WT Docket No. 97-56 at 314.

91. Judge Frysiak's finding that: ". . . Sobel did not submit the Management Agreement to the Commission until July 3, 1996. . . ." (12 FCC Rcd at 22897 ¶62) was based on and consistent with the above-cited evidence. It does appear

that neither the Bureau[20] nor Judge Frysiak addressed Sobel's contention in a footnote to his reply findings and conclusions, that:

> The Presiding ALJ may take official notice that a copy of the written agreement was produced to the Commission on 24 March 1995, as an attachment to Kay's Responses to Wireless Telecommunications Bureau's First Request for Documents in WT Docket No. 94-147, the Kay license revocation proceeding.

Reply to the Wireless Telecommunications Bureau's Proposed Findings of Fact and Conclusions of Law, filed October 27, 1997 at 9 n. 5.[21] The record does not disclose why the Bureau and Judge Frysiak did not address this footnote. As explained in paragraph 88, *supra*, however, we have no basis to find that this omission had a material impact

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20. The Bureau stated in its reply to the relevant pleading that: "None of Sobel's or Kay's filings in 1994 or 1995 disclosed the relationship between Sobel and Kay with respect to the Management Agreement stations." Wireless Telecommunications Bureau's Comments on Replies to Proposed Findings of Fact and Conclusions of Law, filed October 31, 1997 at 3 ¶4. The record does not disclose whether the Bureau believed that the production of the Management Agreement in discovery on March 24, 1995 was not a "filing," or whether the Bureau inadvertently overlooked the March 24, 1995 submission in making this statement.

21. The associated text in the body of the pleading states: "By this time [when the Commission modified the hearing designation order to delete Sobel's stations], the Bureau had been provided, in discovery, with a copy of the written agreement between Sobel and Kay."

on Judge Frysiak's initial decision. Moreover, the Bureau could hardly have "concealed" the footnote, especially since the Bureau discussed and cited the paragraph containing the footnote in its reply. Wireless Telecommunications Bureau's Comments on Replies to Proposed Findings of Fact and Conclusions of Law, filed October 31, 1997 at 5-6 ¶9.

92. In our decision, we found that Sobel's affidavit went beyond denying that Sobel was Kay's alter ego and made several factual assertions that were misleading. Most notably, we found that the claim that Kay had no "interest" in Sobel's stations was false in light of the substantial financial interests he had under the Management Agreement. Decision at ¶71. We also found that several other statements, while perhaps technically correct, tended to be misleading, such as that Sobel was not an "employee" or "partner" of Kay. *Id.* at ¶73. We found that, in light of the facts as fully disclosed, the affidavit, and the pleading it supported, left the false impression that ". . . Kay has no interest in any license or station in common with Marc Sobel. . . ." *Id.* at ¶74.

93. We found that Sobel appreciated the questionable nature of the claim that Kay had no "interest" in his stations, since Kay had told him that the word connoted "a direct financial stake." Decision at ¶72. Additionally, we found that Sobel and Kay understood that the Commission would want to know the true relationship between them. *Id.* at ¶74-75. Because Sobel could appreciate the nature of the representation, we rejected his attempt to rely on advice of counsel. *Id.* at ¶77.

94. In determining the sanction to be imposed against Sobel, we found that an unauthorized transfer of control accompanied by deception constituted disqualifying misconduct. Decision at ¶80. We took into account, however, that the Management Agreement and the misleading affidavit concerned only some of Sobel's facilities and that he had operated most of his facilities for over twenty years without any record of misconduct. *Id.* at ¶80. We therefore revoked or denied only those facilities on the 800 MHz band, the band on which the Management Agreement Stations operated.

95. We find that our conclusions regarding Sobel reflect adversely on Kay. The representations that we found false and misleading were made in a pleading filed by Kay. For the reasons discussed in the Sobel decision (Decision at ¶74), we reject Kay's argument that the case against him represents mere "quibbles" over the meaning of the words used. We do not believe that a reasonable reader could square the language used with the facts as fully disclosed. Moreover, Kay, like Sobel, understood the questionable nature of the claim that he had no "interest" in Sobel's stations and knew that the Commission would want to know the true relationship between Sobel and Kay. Accordingly, Kay too has no basis to rely on advice of counsel as a defense.

96. We also reject Kay's argument that his disclosure of the Management Agreement during discovery negates any possible intent to deceive. While Kay subsequently disclosed the Management Agreement after specifically being requested by the Bureau during discovery to produce all management documents, he did not disclose the Management Agreement in connection with the pleading at issue here (submitted two

months earlier), although it would have served to clarify his relationship with Sobel. *See Wireless Telecommunications Bureau's First Request for Documents*, filed February 17, 1995, at 6-7 ¶12 (requesting all management documents).

97. Moreover, a finding that Kay deliberately intended to conceal his relationship with Sobel is consistent with other instances in the record indicating that Kay was not forthcoming about stations he managed. For example, beginning in the early 1990s, Kay managed stations that were licensed to Pfeifer, Cordaro, and Sobel. ID at ¶¶108-09, 123-24, 126. In Pfeifer's case, the ALJ found that in 1987, Kay assisted Pfeifer in obtaining a license pursuant to an arrangement whereby Kay was to construct the station and market service when it was filled with users. ID at ¶126. The ALJ did not question Pfeifer's testimony[22] that, to document to the Commission that the station had been constructed, Kay prepared an invoice (WTB Exh. 301) and had Pfeifer issue a check (WTB Exh. 302) for $1,511.87, but had then reimbursed Pfeifer for the amount of the check. Tr. 1556-57. The purported payment was thus not a real payment but was designed merely to generate documentation for the Commission. Although Pfeifer and Kay entered into a lease agreement calling for Pfeifer to pay Kay $600 a month rent for the transmitter site (WTB Exh. 300), Pfeifer testified that Kay did not actually expect any payment. Tr. 1544-45. Pfeifer testified that Kay told her he "needed to have [the lease] to comply with FCC regulations." Tr. 1544.

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22. The ALJ did not question Pfeifer's credibility, although he did question her "reliability" as to some matters. ID at ¶203.

98. Similarly, the record in the Sobel proceeding showed that Kay prepared responses to application return notices (which are sent to indicate problems with land mobile applications) on Sobel's behalf. On customer invoices attached to the responses, Kay blacked out the name of his business, "Lucky's Two-Way Radios." *Marc Sobel*, 12 FCC Rcd at 22898-99 ¶64, 22902 ¶76.[23]

99. Finally, Kay's June 2, 1994, response to the Bureau's 308(b) Letter contained the following language: "Mr. Kay states that he does not operate any station of which either he or [Buddy Corp. or Oat Trunking Group, Inc.] is not the licensee." WTB Exh. 11 at 1. Kay was in fact operating Sobel's stations under an oral agreement at the time. *Marc Sobel*, 12 FCC Rcd at 22883 ¶12. We believe the aforementioned matters are relevant to the designated issues because they confirm the existence of a pattern of conduct. *See Ismail v. Cohen*, 706 F. Supp. 243, 252-53 (S.D.N.Y. 1989); Fed. R. Evid. 404(b).[24]

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23. We found that this matter was irrelevant with respect to Sobel because Kay, not Sobel, had blacked out the information. Decision at n. 6. We believe it is relevant here as demonstrating a pattern of conduct. We therefore reverse Judge Chachkin's rejection of WTB Exhs. 332-33 based on his determination that this matter was irrelevant to the alleged misconduct here. See Tr. 783-90.

24. In view of this pattern of conduct, we do not believe that it is necessary to reach the question of whether this representation by itself constitutes disqualifying misconduct.

Appendix F

VIII. SANCTIONS

100. The record in this proceeding indicates that Kay has violated his obligations as a licensee. Under the 308(b) issue we found that Kay deliberately withheld material information from the Commission without justification in violation of 47 C.F.R. §1.17. As discussed previously, Kay's inadequate responses do not warrant disqualification. The hearing designation order, however, also served as a notice of apparent liability for forfeiture. *James A. Kay, Jr.*, 10 FCC Rcd 2062 ¶16 (1994). *See Abacus Broadcasting Corp.*, 8 FCC Rcd 5110, 5114-15 ¶¶16-18 (Rev. Bd. 1993) (appropriateness of forfeiture for violation of 47 C.F.R. §1.17 absent a finding of deception). We believe that, under the Commission's forfeiture standards, the category most relevant to Kay's misconduct is "Failure to respond to Commission communications," for which the base forfeiture amount is $4,000 per instance. 47 C.F.R. §1.80(b)(4) Note. Because Kay's nonresponsiveness was of a continuous nature, we adjust the forfeiture upwards to $10,000. *Id.*

101. The record also shows that Kay's Motion to Enlarge, Change, or Delete Issues filed by Kay on January 12 and 25, 1995 lacked candor. Although lack of candor may warrant revocation of all licenses, we believe that it is appropriate to limit the sanction imposed here. In particular, we note that deterrence is an important element of the character qualifications process. *See Character Qualifications*, 102 FCC 2d 1179, 1128 ¶103 (1986). The misconduct found here, concerning Sobel's stations, involves only stations operating on the 800 MHz band. We find that the revocation of Kay's licenses for stations operating on

this band will serve as a significant deterrent to future misconduct. Moreover, because we found that the control of Sobel's Management Agreement stations had been transferred to Kay and that Kay shared in the value of these stations, the revocation of these stations also serves to deter future misconduct by Kay as well as by Sobel. We will therefore limit the sanction applicable to Kay to revocation of the 25 licenses for his stations operating on the 800 MHz band.

IX. ORDERING CLAUSES

102. ACCORDINGLY, IT IS ORDERED, That, good cause for filing an additional pleading concerning his November 2, 1999 Motion to Strike not having been shown, the Request for Leave to File Reply, filed November 5, 1999, by James A. Kay, Jr., IS DENIED, and, for the reasons set forth in paragraph 12, *supra*, the Motion to Strike, filed November 2, 1999, by James A. Kay, Jr. IS DENIED.

103. IT IS FURTHER ORDERED, That, for the reasons set forth in note 13, *supra*, the Motion for Leave to File Supplement to Reply Exceptions, filed December 30, 1999, and the Motion for Leave to File a Reply to the Bureau's Opposition to the December 30, 1999 Filing, filed January 20, 2000, by James A. Kay, Jr. ARE DISMISSED as moot.

104. IT IS FURTHER ORDERED, That, because oral argument would not materially assist the Commission, the Request for Oral Argument, filed November 2, 1999, by James A. Kay, Jr. IS DENIED.

Appendix F

105. IT IS FURTHER ORDERED, That the Wireless Telecommunications Bureau's Exceptions and Brief, filed October 12, 1999, IS GRANTED in part and IS DENIED in part.

106. IT IS FURTHER ORDERED, That the *Initial Decision of Chief Administrative Law Judge Joseph Chachkin*, FCC 99D-04 (ALJ Sept. 10, 1999) IS MODIFIED to the extent indicated above.

107. IT IS FURTHER ORDERED that, pursuant to Section 1.80(h) of the Rules, 47 C.F.R. §1.80(h), James A. Kay, Jr. shall, within thirty (30) days of the release of this Decision, pay the amount of $10,000 for the violations described above.[25] Payment of the forfeiture shall be made by check or money order drawn on a U.S. financial institution payable to the Federal Communications Commission. Payment may also be made by credit card with the appropriate documentation[26] The remittance should be marked "NAL/ Acct. No. 915KC0002" and mailed to the following address:

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25. Claims of inability to pay should be supported by tax returns or other financial statements prepared under generally accepted accounting principles for the most recent three year period.

26. Request for installment plans should be mailed: Chief, Credit & Debt Management Center, Mail Stop 11110A2, 445 Twelfth Street, S.W., Washington, D.C. 20554. Payment for the forfeiture in installments may be considered as a separate matter in accordance with Section 1.1914 of the Rules, 47 C.F.R. §1.1914. Please contact Chief, Credit & Debt Management Center for information regarding credit card payments.

Appendix F

Federal Communications Commission
P.O. Box 73482
Chicago, Illinois 60673-7482

Forfeiture penalties not paid within thirty (30) days will be referred to the U.S. Attorney for recovery in a civil suit. 47 U.S.C. §504(a).

108. IT IS FURTHER ORDERED, That the following licenses of James A. Kay, Jr., ARE REVOKED: WNIZ676, WNMT755, WNVL794, WNVW779, WNWB268, WNWB332, WNWK982, WNWN703, WNWQ651, WNXB280, WNXQ372, WNXQ353, WNXQ911, WNXS450, WNXS753, WNXW280, WNXW549, WNYQ437, WNYR747, WNZY505, WNZZ731, WPAP683, WPAZ639, WPBW517, WNXW487.

109. IT IS FURTHER ORDERED, That the licensee IS AUTHORIZED to continue operation of the stations mentioned in paragraph 108 until 12:01 A.M. on the ninety-first day following the release date of this decision to enable the licensee to conclude the stations' affairs; PROVIDED, HOWEVER, that if the licensee seeks reconsideration or judicial review of our action revoking its license, it is authorized to operate the stations until final disposition of all administrative and/or judicial appeals.

110. IT IS FURTHER ORDERED that a copy of this order shall be sent by certified mail, return receipt requested, to James A. Kay, Jr., P.O. Box 7890, Van Nuys, California 91409-7890.

Appendix F

111. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX G — DECISION OF THE FEDERAL COMMUNICATIONS COMMISSION RELEASED JANUARY 25, 2002

Before the
Federal Communications Commission
Washington, D.C. 20554

WT Docket No. 97-56

In the matter of

MARC SOBEL

Applicant for Certain Part 90 Authorizations in the Los Angeles Area and Requestor of Certain Finder's Preferences

MARC SOBEL AND MARC SOBEL
D/B/A AIR WAVE COMMUNICATIONS

Licensee of Certain Part 90 Stations in the Los Angeles Area

APPEARANCES

Robert J. Keller on behalf of *Marc Sobel*; *Aaron P. Shainis*, *Lee J. Peltzman*, *Barry A. Friedman* and *Scott A. Fenske* on behalf of *James A. Kay, Jr.*; and *Charles W. Kelley*, *Gary P. Schonman*, *William H. Knowles-Kellett*, *John J. Schauble*, and *D. Anthony Mastando* on behalf of the Wireless Telecommunications Bureau and the Enforcement Bureau,[1] Federal Communications Commission.

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1. The Enforcement Bureau was established effective November 8, 1999. *See News Release FCC Reshapes for the Future* (Oct. 25,

(Cont'd)

Appendix G

DECISION

Adopted: November 20, 2001 **Released:** January 25, 2002

By the Commission: Commissioner Martin concurring in part, dissenting in part, and issuing a statement.

I. INTRODUCTION

1. This decision modifies an Initial Decision by Administrative Law Judge John M. Frysiak concluding that Marc Sobel lacks the requisite qualifications to be a Commission licensee of Part 90 land mobile stations. *Marc Sobel*, 12 FCC Rcd 22879 (ALJ 1997). We find that Sobel transferred control of some of his facilities in the land mobile service without Commission authorization and that he lacked candor about the status of these facilities in a sworn affidavit. We modify the initial decision to the extent that we conclude that it is appropriate to limit the sanctions imposed to Sobel's facilities and applications on the 800 MHz band.

II. BACKGROUND

2. This proceeding is an offshoot of WT Docket No. 94-147, which the Commission designated for hearing to determine whether James A. Kay, Jr., a licensee of land mobile radio facilities under Part 90 of the Commission's rules, complied with those rules and whether he possesses

(Cont'd)

1999). Its responsibilities include serving as trial staff in formal Commission hearings. It has participate din this proceeding in lieu of the Wireless Telecommunications Bureau beginning in November 1999.

the character qualifications to remain a Commission licensee. *James A. Kay, Jr.*, 10 FCC Rcd 2062 (1994), *modified*, 11 FCC Rcd 5324 (1996). Kay was ordered to show cause why his licenses should not be revoked or cancelled, why he should not be ordered to cease and desist from certain violations of the Communications Act, and why an order for forfeiture should not issue.

3. In designating that proceeding for hearing, the Commission found that: "Information available to the Commission also indicates that James A. Kay, Jr. may have conducted business under a number of names. . . . We believe these names include . . . Marc Sobel dba Airwave Communications." 10 FCC Rcd at 2063 ¶3. Accordingly, the Commission designated for hearing in WT Docket No. 94-147 11 licenses held in the name of Marc Sobel. *Id.* at 2080. On January 25, 1995, Kay moved to enlarge, change, or delete issues, alleging in part that the Commission erred in designating the 11 Sobel licenses for hearing. WTB Exh. 44 at 4-5. Subsequently, on February 23, 1996 and March 6, 1996, the Wireless Telecommunications Bureau itself filed pleadings indicating that the relationship between Kay and the Sobel licenses was unclear and needed to be explored in a nonadjudicatory investigation. After the ALJ certified the matter, the Commission deleted the Sobel applications from WT Docket No. 94-147. *James A. Kay, Jr.*, 11 FCC Rcd 5324 (1996).

4. On June 11, 1996, the Bureau, pursuant to 47 U.S.C. § 308(b), sent a letter of inquiry to Sobel asking him to detail his business association with Kay. SBL Exh. 6, Att. 9. Sobel responded by disclosing a document entitled "Radio System

Management Agreement and Marketing Agreement," dated December 30, 1994, (Management Agreement) under which Kay managed 15 conventional SMR stations in the 800 MHz band licensed to Sobel.[2] SBL Exh. 3, WTB Exh. 39. Based on the terms of the Management Agreement, the Commission found a substantial and material question of fact as to whether Sobel has transferred control of the stations covered by the Management Agreement to Kay without Commission approval in violation of 47 U.S.C. § 310(d). *Marc Sobel*, 6 CR 64112 FCC Rcd 3298 (1997). Sobel was ordered to show cause why the Management Agreement stations (of which there were then only 13), and 15 stations licensed to Sobel in the Business Radio Service, two on the 800 MHz band and 13 on the 450 MHz and 470-512 MHz bands, should not be revoked. The Commission also designated for hearing Sobel's pending applications for 13 facilities, five on the 800 MHz and eight on the 450 MHz and 470-512 MHz bands and five pending requests by Sobel for finder's preferences for stations on the 800 MHz band. Following designation, the ALJ added an issue to determine whether Sobel made misrepresentations or lacked candor in a January 24, 1995 affidavit filed in support of Kay's motion to enlarge, change, or delete issues. *Marc Sobel*, FCC 97M-82 (May 8, 1997).

5. In his initial decision, the ALJ concluded that Sobel was unqualified to be a Commission licensee. *Marc Sobel*,

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2. The Specialized Mobile Radio Service (SMR) was established on the 800 MHz band to provide radio dispatch communications to customers within local areas. SMR stations are classified as either conventional or trunked. *See amendment of Part 90*, 10 FCC Red 7970, 7974-75 ¶¶3-4 (1994); *Amendment of Part 90*, 60 RR 2d 867, 868 ¶2 (1986).

12 FCC Rcd 22879 (ALJ 1997). He found that, consistent with the criteria set forth in *Intermountain Microwave*, 24 RR 983 (1963), Sobel transferred control of the stations covered by the Management Agreement to Kay without Commission authorization. *Id.* at 22899-900 ¶¶65-68. He further found that Sobel's affidavit misrepresented Kay's relationship to the Management Agreement stations and that Sobel also lacked candor before the Commission both by failing to submit voluntarily the Management Agreement to the Commission and in correspondence with the Commission. *Id.* at 22900-902 ¶¶69-77. The ALJ therefore revoked Sobel's licenses, denied his applications, and dismissed his finder's preference requests. *Id.* at 22902-03 ¶¶78-80.

6. Now before the Commission are exceptions filed by Sobel and Kay and a reply by the Bureau and several associated pleadings. For the reasons set forth below, we modify the initial decision. We find that Sobel did transfer control of the Management Agreement stations without Commission authorization and lacked candor about the status of the stations. However, we conclude that it is appropriate to limit the sanctions for these improprieties to Sobel's interests on the 800 MHz band.

III. PROCEDURAL MATTERS

7. Before we turn to the merits of the case before us, we wish to address three procedural matters. First, Sobel argues in his exceptions that the hearing in this proceeding violates 5 U.S.C. § 558(c), which states in pertinent part:

> Except in cases of willfulness or those in which the public health, interest, safety requires

> otherwise, the withdrawal, suspension, revocation, or annulment license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given —
>
> > (1) notice by the agency in writing of the facts or conduct which may warrant the action; and
> >
> > (2) opportunity to demonstrate or achieve compliance with all lawful requirement[s].

Sobel claims that the hearing designation order was the first notice he had of the transfer of control allegations and that, prior to designation, the Bureau had declined Sobel's requests to apprise him of the Bureau's concerns. Sobel disputes that the "willfulness" exception applies in this case. The Bureau asserts that Sobel's alleged misconduct was "willful" within the meaning of the Communications Act.

8. We find that the hearing designation order in this proceeding complies with 5 U.S.C. § 558(c) because the misconduct alleged was "willful." The term "willful" is not defined by the APA. Thus, to determine the appropriate definition of "willful" for purposes of applying § 558(c), we refer to the substantative statute involved, in this case the Communications Act. *See Hutto Stockyard, Inc. v. U.S. Department of Agriculture*, 903 F.2d 299, 304 (4th Cir. 1990) (Packers and Stockyards Act); *Lawrence v. Commodity Futures Trading Commission*, 759 F.2d 767, 773 (9th Cir. 1985) (Commodities Exchange Act); *Finer Foods Sales, Inc.*

v. Block, 708 F.2d 774, 778 (D.C. Cir. 1983) (Perishable Agricultural Commodities Act). The Communications Act states:

> The term "willful", when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act, or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States.

47 U.S.C. § 312(f)(1). Both of the issues designated in this proceeding clearly involve conscious and deliberate acts and, therefore, "willfulness."

9. Second, on February 27, 1998, Sobel filed a pleading entitled Request for Inquiry and Investigation in which he alleges that the Bureau committed improprieties in connection with this proceeding. In his reply to the Bureau's opposition, Sobel indicates that:

> The Bureau argues that Sobel's *Revised Request for Inquiry and Investigation ("Request")* is an improper an untimely supplement to Sobel's appeal from the *Initial Decision of Administrative Law Judge John M. Frysiak*. . . . But Sobel is not seeking to supplement his appeal. Sobel timely submitted his *Consolidated Brief and Exceptions ("Exceptions")* and he stands by that pleading insofar as the Commission's review of the *Initial Decision* is concerned. For purposes of the

> *Request*, Sobel is not challenging the presiding officer's conduct of the hearing and his *Initial Decision*, nor is he challenging the action of the Commission in designating the hearing. Sobel is separately seeking an inquiry and investigation by Bureau personnel in connection with the proceeding.

Reply to Opposition at 1-2. The cited language makes clear that Sobel's request has no bearing on our review of the initial decision, and we need not consider it further here. Nevertheless, out of an abundance of caution, we have examined Sobel's allegations. In many respects, these allegations are identical to those independently raised by Kay in WT Docket No. 94-147. *See James A. Kay, Jr.*, 13 FCC Rcd 16369 (1998), *pet. for recon. dismissed*, 14 FCC Rcd 1291 (1998). In considering Kay's allegations, we found no basis to conclude that the Bureau's conduct had resulted in any material prejudice and we see no reason to believe that this conduct prejudiced Sobel. *Id.* We reaffirmed this conclusion, disavowing adverse conclusions by Chief Judge Chachkin, after examining the full record in the Kay proceeding. *James A. Kay, Jr.*, FCC 01-341 (adopted Nov. 20, 2001) at n.3 (*see* paragraph 10, *infra*). Additionally, Sobel contends that the Bureau acted unreasonably after the inclusion of Sobel's licenses in the Kay hearing designation order had been questioned. Sobel alleges that the Bureau declined to permit Sobel to address the Bureau's concerns outside the context of a hearing proceeding and instead initiated the designation of this proceeding. As the discussion below indicates, our review of the record developed in this proceeding demonstrates that there was an ample basis to

designate this proceeding for hearing and fails to disclose any indication that Sobel was denied a full opportunity to meet the issues raised. Accordingly, no further action is warranted.

10. Third, Sobel asks the Commission to defer review of the initial decision in this proceeding and consolidate consideration of the initial decision in this proceeding with that in WT Docket No. 94-147 concerning James A. Kay, Jr. In that proceeding, then Chief Administrative Law Judge Joseph Chachkin ruled that Kay, and Sobel, did not make misrepresentations or lack candor before the Commission. *James A. Kay, Jr.*, FCC 99D-04 (ALJ Sept. 10, 1999). His findings were thus contrary to Judge Frysiak's findings in this proceeding. We have on our own motion undertaken to consider the two proceedings concurrently. In a companion decision we have ruled today on exceptions filed by the Wireless Telecommunications Bureau in WT Docket No. 94-147. *James A. Kay, Jr.*, FCC 01-341 (adopted Nov. 20, 2001) (Decision). In that proceeding, we held that because Kay is a party in WT Docket No. 97-56 (this proceeding), he is bound by the determinations made here to the extent that they involve findings and conclusions common to the two proceedings. Decision at ¶85. As Sobel requests, we considered the fact that Chief Judge Chachkin and Judge Frysiak reached inconsistent conclusions about the credibility of Kay and Sobel. We decided not to defer to either ALJ and based our decision on our own independent assessment of the nature of the representations made and the circumstances that were involved. Decision at ¶¶86-87. In view of our action, we will dismiss Sobel's petition to defer and consolidate as moot.

Appendix G

IV. TRANSFER OF CONTROL

11. *Background.* The ALJ found that Sobel and Kay have been friends for over 20 years and that they have each been involved in the land mobile radio business since the 1970s. 12 FCC Rcd at 2282-83 ¶¶7-9. In the 1990s, Sobel became interested in holding 800 MHz licenses. He did not, however, have the disposable funds to invest in 800 MHz and thus did not have the option of pursuing 800 MHz operations on his own. He approached Kay, who already owned profitable 800 MHz stations. Sobel relied on Kay to prepare the applications, because Kay had the necessary specialized software and knowledge. Sobel and Kay also entered into an oral agreement under which Kay would manage the stations. *Id.* at 2283-84 ¶¶11-14. In September or October, 1994, Kay received, in response to a Freedom of Information Act request, a copy of a draft hearing designation order relating to his stations (which, as noted above, also dealt with stations licensed to Sobel). Shortly, thereafter, on October 28, 1994, Sobel and Kay reduced their oral agreement to writing. (The written agreement was corrected and supplemented on December 30, 1994.) The agreement was prepared by Brown & Schwaninger, a law firm then representing both Sobel and Kay. It is effective for a term of 10 years and renews automatically for five consecutive 10 year terms unless Kay gives notice to the contrary. *Id.* at 2284-85 ¶¶15-16, 18.

12. The ALJ analyzed the terms of the Management Agreement in light of the criteria set forth in *Intermountain* for determining the control of nonbroadcast radio facilities. These criteria are:

> (a) Does the licensee have unfettered use of all facilities and equipment?
> (b) Who controls daily operations?
> (c) Who determines and carries out policy decisions, including preparing and filing applications with the Commission?
> (d) Who is in charge of employment, supervision and dismissal of personnel?
> (e) Who is in charge of the payment of financing obligations, including expenses arising out of operating?
> (f) Who receives monies and profits from the operation of the facilities?

12 FCC Rcd at 22899 ¶66. *See Intermountain*, 24 RR at 984. Additionally, *Intermountain* indicates that:

> Ownership of the licensed facilities by someone other than the licensee is not necessarily inconsistent with these incidents of control. At a minimum, however, where ownership rests in hands other than those of the licensee, the maintenance and retention of the latter's exclusive right to operate must be clearly reflected.

24 RR at 984-85. To clarify our discussion, we will first present the ALJ's findings, the parties' responses to those

findings, and our analysis for each of the individual *Intermountain* criteria. We will then discuss our overall analysis of the transfer of control issue.

(a) ***Does the licensee have unfettered use of all facilities and equipment?***

13. The ALJ found that under the terms of the Management Agreement Kay "shall be the sole and exclusive supplier of all equipment and labor required to maintain and repair the Stations' facilities . . ." 12 FCC Rcd at 22885 ¶19. Sobel, in turn, maintains and repairs the stations as a contract technician for Kay, to whom Kay pays an hourly fee. *Id.* at 2285, 22887-88 ¶¶20, 27. The ALJ found that Sobel performed this role in accordance with an unwritten understanding between Sobel and Kay that was not part of the Management Agreement. *Id.* at 2285 ¶20. Sobel also repairs and services approximately 350 stations that Kay currently owns or manages. *Id.* at 22882-83 ¶9. To perform these functions, Sobel must drive through locked security gates and gain access to locked buildings and cabinets. *Id.* at 22885-86 ¶21. Sobel has in his possession the keys necessary to accomplish this. Moreover, control points for the stations are located in Sobel's home office. *Id.* Sobel also possesses the access codes needed to activate the repeaters and performs a majority of the activations on both the Management Agreement stations and Kay's stations. *Id.* at 2287 ¶25.

14. Sobel and Kay submit that Sobel's access to the stations' facilities, including the possession of keys needed to access locked facilities, demonstrates that he has "unfettered use" within the meaning of *Intermountain.*

15. The Bureau responds that Sobel's access to the facilities is meaningless in light of the fact that, under the Management Agreement, Kay is the sole supplier of equipment and labor for the stations. The Bureau stresses that Sobel's access to the facilities is as Kay's contractor and that Kay has the authority to replace Sobel in that capacity, if he wants to.

16. We agree with Sobel and Kay that Sobel has "unfettered use" of the stations' facilities. The key question under this criterion is one of access. *See Brian L. O' Neill*, 6 FCC Rcd 2572, 2575 ¶28 (1991). The Management Agreement provides that:

> [Sobel] shall have unlimited access to all transmitting facilities of the Stations, shall be able to enter the transmitting facilities and discontinue any and all transmissions which are not in compliance with the FCC rules . . . .

SBL Exh. 3 [WTB Exh. 39] at 5 ¶ VIII. Moreover, the record makes clear that Sobel in fact has access to the stations' facilities, has possession of keys necessary to enter locked facilities, and has a control point for the stations in his home. Tr. 118, 189-90, 225-26. In this regard, we do not find it significant that, as the Bureau points out, Sobel exercises this access primarily in his capacity as a contract technician for Kay and that he has similar access to Kay's stations. Tr. 118. The fact remains that he has access. However, this factor ultimately has little significance in this case, because it is significantly outweighed by other factors demonstrating an unauthorized transfer of control.

Appendix G

(b) *Who controls daily operations?*

17. According to the ALJ, the Management Agreement provides that Kay "shall be the sole and exclusive agent for the sale of all services" provided by the Management Agreement stations and for "the management of the Station's transmitting facilities and associated business." Pursuant to this provision, Kay and his staff handle bookkeeping, billing, and collections and the payment of station obligations. Kay also has the exclusive right to negotiate and execute contracts with customers of the stations. 12 FCC Rcd at 22886 ¶22. Kay's salespeople sell time on the Management Agreement stations, Kay's stations, and community repeaters. Sobel recruits customers himself for his 450 MHz and 470-512 MHz band stations, and will sometimes refer customers to Kay. *Id.* at 22886-87 ¶¶23-24. (The ALJ found that Kay, Sobel, and other dealers customarily refer customers to each other. *Id.*) The ALJ found that customers are placed on Kay's stations, the Management Agreement stations, or both based on the customer's needs and not on the ownership the stations. *Id.* Salesman have no reason to know whether they are selling time on a Management Agreement station or a Kay station. *Id.* at 22888 ¶28. When a Kay salesperson has made a sale, the salesperson goes to Barbara Ashauer, a Kay employee for the assignment of frequencies and codes. Ashauer may either assign the frequencies and codes herself or ask the assistance of Kay or Sobel. Sobel also assigns frequencies for many Kay stations. Ashauer then generates a request to activate the customer's radio system, which is usually performed by Sobel for both the Management Agreement and Kay stations. *Id.* at 22886-87 ¶¶24-25. As to billing, customers receive a consolidated bill covering both

Management Agreement and Kay stations, unless they request separate bills. Sobel reviews revenue levels for Management Agreement stations every few months. He has free access to Kay's office during business hours and obtains the information from Kay's computer. *Id.* at 22887 ¶26.

18. Additionally, Sobel performs repair and maintenance services for the Management Agreement and Kay's stations. He monitors both types of stations and receives calls from Kay's employees. Sobel's invoices do not distinguish between the two types of stations. 12 FCC Rcd at 22887-88 ¶27. Kay's technicians also work on stations Kay owns or manages, including the Management Agreement stations. They have no reason to know whether the station they are working on is licensed to Kay. *Id.* at 22888 ¶28.

19. In their exceptions, Sobel and Kay characterize Sobel as a "hands on owner" who constructed and maintains facilities, monitors the repeaters, and visits them. They observe that Sobel participates in setting billing rates (*see* paragraph 25, *infra*) and in placing customers on repeaters and that he has full access to station records. Additionally, they note that the Management Agreement contains a provision that expressly reserves ultimate control over the management of the stations to Sobel.

20. The Bureau emphasizes that the Management Agreement gives Kay the exclusive right to manage the stations' facilities and business. The Bureau asserts that most of Sobel's participation in station affairs is as Kay's contractor and that neither Sobel nor Kay's employees treat the Management Agreement stations any differently from stations

owned by Kay. The Bureau discounts the significance of the provision in the Management Agreement reserving ultimate control to Sobel. It maintains for example that Sobel can reject contracts and disapprove transmitter site locations only if doing so would be in Kay's interests as well as Sobel's.

21. The record indicates that Kay routinely exercises control over daily operations. The terms of the Management Agreement makes this clear: These terms provide that:

> [Kay's] duties shall include all administrative and office functions associated with the Stations' services, including but not limited to bookkeeping, billing and collections.

SBL Exh. 3 [WTB Exh. 39] at 2 ¶I.

> [Kay's] duties shall include all management functions associated with the operation of the Stations, including but not limited to invoicing of users, collection of payments from users, bookkeeping and accounting processes, disbursement of payments to suppliers of goods and services, and control point operation. . . . the negotiation and execution of any [contracts with third parties] shall be within the sole and exclusive discretion of [Kay].

SBL Exh. 3 [WTB Exh. 39] at 2 ¶II.

> [Kay] shall be the sole and exclusive supplier of all equipment and labor required to maintain the Stations' facilities. . . .

SBL Exh. 3 [WTB Exh. 39] at 3 ¶III.

22. There is no reason to depart from the ALJ's ample findings concerning the dominant role of Kay and his employees in the stations' daily operations pursuant to these provisions. We find the attempts by Sobel and Kay to characterize Sobel as a "hands on" owner unpersuasive, especially since Sobel admits that he exercises most of his functions as a contract technician for Kay and that his duties are virtually identical to those exercised with respect to Kay's stations. Tr. 107-08, 114, 116-18, 123-24, 144, 314-16. Moreover, the record indicates that there is generally no distinction made between the management of the Management Agreement stations and that of Kay's stations. Thus, Kay's sales people and technicians generally do not make a distinction between the two classes of stations, there is no distinction made in assigning customers to one class or the other, and the customers generally receive a single bill regardless of which class of station they use. Tr. 314-17, 343-49. The significance of Kay's operational control here must be evaluated in light of the record as a whole and will be further discussed below.

(c) *Who determines and carries out policy decisions, including preparing and filing of applications with the Commission?*

23. The ALJ made findings concerning five policy-related matters: (1) preparation and filing of applications, (2) setting billing rates, (3) clearing channels, (4) buying and selling stations, and (5) retention of counsel.

24. *Applications.* The ALJ found that Kay would do the research needed to locate available frequencies, which he

would review with Sobel, making a recommendation where the repeater would be located. 12 FCC Rcd at 22888 ¶30. Of the six or seven sites at which the stations are located, one is a site used for Sobel's 450 MHz and 470-512 MHz band stations (and subleased to Kay) and the others are sites for which Kay negotiated and executed leases. *Id.* at 22888 ¶31. Sobel testified that Kay prepared "most" of the applications using specialized software that he had on his computer. Sobel indicated that he could have prepared the applications himself, but that because Kay had the software and specialized knowledge, it was more convenient for Kay to do so. *Id.* at 22888-89 ¶32. Sobel reviewed and signed each application but made no edits except for correcting the misspelling of his name. *Id.* at §22889 35. Kay also filled out submissions to the frequency coordinator that reviewed the applications, which Sobel signed. *Id.* at 22889 ¶34. Kay, at Sobel's request, also prepared responses to Commission application return notices. *Id.* at 22889 ¶36.

25. *Billing rates.* The ALJ found that the standard rate for the Management Agreement stations was $12 a month, the same as for Kay's stations. The last change in standard rates occurred three or four years ago, and Sobel does not recall whose idea it was to make the change. According to Sobel, Kay or his employees do the majority of negotiating with customers but Sobel does some negotiating. 12 FCC Rcd at 22891 ¶42.

26. *Clearing channels.* All of the applications for the Management Agreement stations were for encumbered channels—*i.e.*, channels shared with other licensees. The ALJ found that Kay and Sobel agreed that Kay would do the work

and spend the money needed to clear the channels—*i.e.*, to have unused licenses on the channels cancelled and to persuade other licensees to vacate the channels. Sobel claimed that he did not have the time or money to do this and stated that he knew that Kay was successful at this activity. Sobel had assisted Kay in doing work needed to clear Kay's channels. 12 FCC Rcd at 22890 ¶37-38.

27. *Buying and selling.* The ALJ made several findings concerning the buying and selling of stations. Three of the Management Agreement stations were obtained through assignment. Sobel paid nothing for the stations and does not know whether money was paid. 12 FCC Rcd at 22890 ¶39. Under the Management Agreement, Kay has an option to purchase any of the Management Agreement stations for $500 each for the license, assets, and business associated with the station. The Management Agreement also prohibits Sobel from selling any of the Management Agreement stations without Kay's approval. *Id.* at 22890 ¶40. Three of the stations subject to the Management Agreement have been sold. Kay arranged for the sale of one station to William Matson for between $70,000 and $100,000, of which Sobel received $20,500. Sobel received $500 of the proceeds from the sale of a second station. Sobel received the cancellation of a license on another frequency in return for the assignment of a third station, which increased the value of Sobel's station. Sobel persuaded Kay not to accept a $1.5 million offer for the Management Agreement stations. *Id.* at 2289091 ¶41.

28. *Counsel.* The ALJ found that Kay introduced Sobel to the law firm of Brown & Schwaninger, which also represented Kay, in the mid-1990s. Brown & Schwaninger

represented both Sobel and Kay in drafting the Management Agreement. Kay also directed Sobel to Robert Keller, Sobel's current FCC counsel. Kay has paid all of Sobel's legal fees in connection with the Management Agreement stations, including the costs of this hearing. 12 FCC Rcd at 22890 ¶43.

29. Kay claims that all actions regarding the stations, including the filing of applications, are made under Sobel's supervision and control. Sobel indicates that he makes policy decisions by: (1) determining when to make adjustments in prices charged customers; (2) reviewing the placement of customers on repeaters; (3) reviewing applications and filings (which Kay prepares as a convenience); and (4) having the stations' main control point in his office. Sobel contends that Kay's participation is at his request and under his supervision.

30. The Bureau replies that an examination of the five types of policy decisions discussed by the ALJ shows that Kay makes policy decisions.

31. The record fails to substantiate that Sobel retained his authority to make policy decisions with respect to the Management Agreement stations. Rather, the record consistently demonstrates Sobel's delegation of authority to Kay in each of the five areas reflected in the record. (1) Kay had "primary responsibility" for preparing applications and suggested frequencies and transmitter sites. Tr. 73-75, 206. While Sobel reviewed all forms, he recalled making no edits except for correcting the misspelling of his name. Tr. 75. (2) The record discloses little if any input by Sobel in setting the stations' billing rates. The standard rate charged by the

Management Agreement stations is the same as for Kay's stations and is assertedly typical of the industry as a whole. Tr. 129. Sobel could not recall whose idea it was to change the standard rate, some three or four years ago. Tr. 130. Although Sobel claims to have determined the rates charged some individual customers, he could recall changing the rate charged by Kay or his employees only two or three times and admits that he discussed rates with Kay only a handful of times a year. Tr. 123, 129. Moreover, this claim is contrary to the express terms of the Management Agreement, which gives Kay the sole discretion to negotiate contracts. SBL Exh. 3 [WTB Exh. 39] at 2 ¶IIA. (3) Sobel admits that he did not have the time or money to deal with the clearance of the channels on which the Management Agreement stations operated and that he relied on Kay's resources and success in this area. Tr. 198-99. (4) Kay arranged for the acquisition of some Management Agreement stations through assignment, and Sobel was unaware of the details. Tr. 101-02. Kay also arranged for the sale of a station to Matson. Tr. 366. Sobel did not know the amount of money received for a second station that was sold. Tr. 127-28. In describing the decision not to sell the Management Agreement stations for $1.5 million, Sobel indicates that he "convinced" Kay not to sell and that Kay "acquiesced" in Sobel's view—not that Sobel decided not to sell. Tr. 275. (5) Sobel has consistently used lawyers referred by Kay and these lawyers sometimes represented Kay at the same time. Tr. 109-10. We find no justification for treating Sobel's involvement in the placement of customers on repeaters and the presence of a control point in his home, which he can use to activate and deactivate radios, as evidence of decisionmaking authority since they are consistent with his duties as a contract technician for Kay. Tr. 123-24, 314-17, 343-49.

32. While Sobel might legitimately have delegated authority to Kay in any of the individual instances mentioned, the record as whole, at best, shows a failure by Sobel to exercise positive authority over policy decisions. At worst, the record suggests a wholesale deferral to Kay. It thus, fails to lend substance to the provision in the Management Agreement that: "[Sobel]" shall retain ultimate supervision and control of the operation of the stations." SBL Exh. 3 [WTB Exh. 39] at 5 ¶VIII. The ultimate significance of this factor will be discussed below.

(d) ***Who is in charge of employment, supervision and dismissal of personnel?***

33. The ALJ found that Sobel has no employees and is not sure whether he ever hired any contractor to do work relating to a Management Agreement station. 12 FCC Rcd at 22892 ¶44. The employees of Kay who perform work relating to the Management Agreement stations are hired, fired, and supervised by Kay.

34. Kay and Sobel assert that Kay's employees perform functions that are limited by the Management Agreement.

35. The Bureau points out that Kay's employees perform all duties associated with the stations' business and that Kay could dismiss Sobel as his contractor.

36. In the facts of this case, this criterion is essentially redundant with the question of who controls daily operations. All of the employees and contractors (including Sobel) are retained by Kay in connection with his responsibilities under

the Management Agreement. Accordingly, we will not analyze this factor separately.

(e) *Who is in charge of the payment of financing obligations, including expenses arising out of operating?*

37. The ALJ found that, under the Management Agreement, Kay is responsible for paying all of the stations' construction and operating expenses. Kay estimated that his total investment in station equipment is $97,500. He did not know how much he has paid in operating expenses for the Management Agreement stations because he does not break out the expenses based on the ownership of the stations 12 FCC Rcd at 22892 ¶46-47.

38. Sobel and Kay argue that the provisions of the Management Agreement under which Kay pays station expenses and purchases equipment represent a legitimate business judgment on Sobel's part. They urge that it would have been more expensive for Sobel to construct and operate the stations on his own and that it was therefore reasonable for him to finance the operation out of future revenues rather than up front. The Bureau finds Sobel's and Kay's reference to business judgment unpersuasive.

39. The Management Agreement is structured to relieve Sobel of any liability for the construction and operation of the stations. Specifically, the Management Agreement provides that Sobel has no liability in relation to contracts regarding the provision of marketing services (SBL Exh. 3 [WTB Exh. 39] at 2 ¶IA), management services (*Id.* at 2

¶IIA), and maintenance services (*Id.* at 3 ¶IIIA), and that Kay shall bear all costs of construction and operation. (*Id.* at 3 ¶IV, 6 ¶XIII). Accordingly, Kay pays all of the stations' expenses and has invested some $97,500 ($6,500 x 15) to build the stations. Tr. 131, 144, 353-54. Sobel acknowledges that his arrangements with Kay were intended to relieve him of the burden of independently acquiring the transmitter sites and equipment and of having the facilities installed and maintained. Tr. 185-86. Indeed, he testified that he regarded his arrangement with Kay as "a good deal" in part because it posed "very little" financial risk. Tr. 309.

40. We have no reason to dispute the characterization of Sobel and Kay that this reflects a reasonable exercise of business judgment on Sobel's part. However, such an exercise of business judgment appears tantamount to an intent to transfer the risks normally associated with ownership and control. Thus, for example, a business owner who decides to sell an equity interest in a venture as an alternative to seeking bank financing has encumbered his ownership interest. As Sobel and Kay aptly put it, such an action would serve to finance the start-up of the business out of future revenues. We will further consider the implications of this factor below.

(f) ***Who receives monies and profits from the operation of the facilities?***

41. According to the ALJ, the revenues from the Management Agreement stations are deposited in Kay's bank account along with the revenues from Kay's stations. Under the Management Agreement, Kay is entitled to the first $600 a month in revenue from each station plus 50 percent of the

revenue in excess of $600. At the time of the hearing, four of the 15 Management Agreement stations had revenues of over $600 a month and the total revenue of the 15 stations was between $6,000 and $7,000 a month. Nevertheless, Sobel has not received any money from the stations other than his hourly fees as a contractor, since he and Kay interpret the Management Agreement as entitling Kay to retain all revenues until the total revenue of all of the stations exceeds $9,000 a month (*i.e.*, $600 x 15). 12 FCC Rcd at 22892-93 ¶48.

42. Kay and Sobel defend the legitimacy of the arrangement under which Kay receives a share of station revenues. Kay argues that he validly receives the first $600 a month of station revenues as compensation for his services. Sobel maintains that he would have received more than his hourly compensation as a contractor if the impediments posed by the Commission proceedings involving the stations had not impaired their revenues. Additionally, Sobel maintains that there is nothing improper in Kay using his own bank account when collecting station revenues.

43. The Bureau responds that it is suspicious that Sobel has not yet received any of the stations' revenues.

44. The record indicates that, pursuant to the Management Agreement, Kay would receive a large percentage of the stations' revenues. If, as Sobel estimated at one point (Tr. 268), the stations could be expected to generate $1,000 a month, Kay would receive 80 percent of the revenues ($600 + 50% x $400). At the time of the hearing, Kay had retained 100 percent of the stations' revenues of

approximately $400 to $470 per station a month ($6,000 or $7,000 / 15). Tr. 132.

45. We accept the claims of Sobel and Kay that the retention of funds by Kay reflects compensation for Kay's management services, reimbursement for expenses paid by Kay, and the rental of station equipment owned by Kay. Tr. 103-04, 144, 186. *See also* SBL Exh. 3 [WTB Exh. 39] at 4 ¶VI. However, these considerations appear to apply primarily to Kay's right to the first $600 a month earned by each station. Tr. 144, 186. Otherwise, it appears that the parties intend to share the proceeds of the stations more or less equally, in the manner of partners. We will discuss the ultimate significance of this factor below.

Ownership of facilities

46. The ALJ found that pursuant to the terms of the Management Agreement Kay selected, purchased, and provided all equipment used in connection with the stations. 12 FCC Rcd at 22885 ¶19. The ALJ found that the equipment is "leased" (ALJ's quotes) to Sobel and that Sobel has no title, interest, or control over the equipment except to the extent he was granted permission to use Kay's equipment. *Id.* He also found that the Management Agreement gives Kay an exclusive option to purchase the stations for $500 each. *Id.* at 22890 ¶40. It also requires Sobel to maintain ownership of the stations. The ALJ therefore concluded that Sobel was precluded from selling any of the stations, but that Kay could sell the stations by first exercising his purchase option. *Id.*

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47. Sobel contends that the ALJ had no basis to question the bona fides of the arrangement under which Sobel leased the stations' equipment from Kay. He further contends that a lease is a legitimate means by which a licensee may possess equipment consistent with the licensee's retention of control. Both Kay and Sobel argue that the purchase option provisions are consistent with the retention of control by Sobel.

48. The Bureau points out that Kay and not Sobel paid the expenses of constructing the stations and that Sobel does not pay rent under the supposed lease, since under the Management Agreement, rental payments are included in Kay's share of the station revenues. The Bureau also maintains that the purchase option indicates a transfer of control to Kay, since Kay has the power pursuant to the option to oust Sobel by purchasing the stations at a price far less than their market value.

49. Kay's ownership of the stations' equipment and his capital investment in this equipment represent a significant factor in this case. In this regard, we discount Sobel's testimony that because the equipment is leased to Sobel, Kay should not be regarded as having an interest in it. Tr. 147. As the Bureau correctly points out, despite the lease, Kay continues to possess the equipment as part of his day-to-day management of the stations, in relation to which Sobel is a contract technician. Moreover, as the Bureau also points out, the Management Agreement provides no particular sum as the rental payment; the rent is simply an unspecified portion of the total compensation received by Kay. SBL Exh. 3 [WTB Exh. 39] at 3 ¶IV.

50. Additionally, in this case, the purchase option gives Kay a further proprietary interest in the stations. The option permits Kay, for a period of ten years, to purchase any Management Agreement station for $500 per station. SBL Exh. 3 [WTB Exh. 39] at 4 ¶VII. The record indicates that $500 is considerably less than the fair market value of the stations. As noted, one of the stations has already been sold for between $70,000 and $100,000. Tr. 126. Similarly, Sobel also prevailed upon Kay not to accept an offer of $1.5 million for all of the stations—*i.e.*, $100,000 per station. Tr. 275. Kay testified that the purpose of the option was specifically to prevent Sobel from being able to sell the stations in derogation of Kay's long-term contracts. Tr. 365-66. Indeed, the purchase option specifically provides that Sobel may not sell the stations or use them as security. SBL Exh. 3 [WTB Exh. 39] at 5 ¶VIIE. Moreover, as the ALJ found, the option effectively gives Kay the power to "freeze out" Sobel if he chooses to do so. Sobel by contrast has no right to terminate his relationship with Kay. He has no right to sell the stations, and the Management Agreement has a term of 10 years and renews automatically at Kay's sole discretion for up to 50 years. SBL Exh. 3 [WTB Exh. 39] at 6 ¶XIV. These provisions give Kay significant leverage over Sobel.

Summary

51. Based on the foregoing, the ALJ found that Kay had the ultimate control of the Management Agreement stations in accordance with the *Intermountain* criteria. He cited the following specific factors: (1) Kay prepared applications and Commission correspondence; (2) Kay selected and purchased all equipment; (3) Kay supplies the labor to maintain and

repair the facilities; (4) Kay controls the hiring and firing of operating personnel; (5) Kay carries out all administrative duties associated with marketing the stations, such as bookkeeping, billing, and collections; (6) Kay pays all expenses; (7) Kay negotiates and executes contracts with customers; (8) Kay did the work and provided the money to clear the channels used by the stations; (9) Sobel was unfamiliar with the details of the assignments of the three stations that were sold; (10) Kay has an option to purchase the stations for $500 each; and (11) the revenues of the stations are deposited in Kay's bank account.

52. Sobel and Kay argue that their relationship constitutes a resale arrangement such as the Commission encourages. Sobel contends that a similar business arrangement involving an SMR licensee was approved in *Motorola, Inc.* File Nos. 50705 *et al.* (PRB 1985) (unpublished). Sobel and Kay urge that the *Intermountain* criteria are flexible and should take into account the character of the particular service involved. Kay asserts that Sobel has retained control of the stations because he controls daily operations, makes policy decisions, and has unfettered access to facilities and records.

53. As Sobel suggests, guidelines set forth in *Motorola* and restated in *Public Notice*, 64 RR 2d 840 (PRB 1988), have been used to evaluate whether management agreements involving SMR licensees constituted an improper transfer of control. *See Implementation of Sections 3(n) and 332 of the Communications Act*, 9 FCC Rcd 7123 7127-28 ¶20 (1994). These guidelines provide that licensees may hire entities to manage their SMR systems but they may not

contract away control of their systems. *Public Notice*, 64 RR 2d at 841.[3] At a minimum, licensees must retain *bona fide* proprietary interests in, and exercise supervisory control over their systems. *Id.*

54. *Motorola* involved a management agreement between Motorola, Inc. (Motorola) and an SMR licensee called Comven that was similar in many respect to that involved here. Under the agreement, Comven provided the necessary radio equipment for the system. As does Kay in this case (*see* paragraph 21, *supra*), Motorola controlled the daily operations of the stations. Specifically:

> The services provided by Motorola under the contract are installation, including antennas and cables; testing of equipment; payment of antenna site charges; maintenance; marketing;, promotion and sales; customer billing and collections; and updates to systems software. Any costs or additional equipment and supplies associated with these services or the operation of the SMR system are to be paid or provided by Motorola. As compensation for these services Motorola receives

3. Sobel argues that his relationship with Kay is a valid resale arrangement, ". . . [R]esale is an activity in which one entity (the reseller) subscribes to the communications services or facilities of a facilities-based provider and then reoffers communications services to the public (with or without 'adding value') for profit. [footnote omitted]" Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, 3 CR 89511 FCC Red 18455, 18457 ¶3 (1996). Since the Sobel-Kay agreement specifically provides for Kay's management of the licensed facilities, we decline to treat it as simply a resale agreement.

> 70 percent of the monthly gross collections received from end-user customers of the systems. [footnote omitted.] The contracts are effective for ten years and are renewable at Motorola's sole option for an additional five years.

Motorola at ¶8. In determining that the agreement did not represent an unauthorized transfer of control, the Bureau relied primarily on the fact that Comven had purchased the stations' equipment and financed it independently of Motorola. *Motorola* at ¶19; *Public Notice*, 64 RR 2d at 841. This factor was deemed to give the licensee a proprietary interest in the stations' equipment which would not be taken over by the third party hired to manage the stations and would give the licensee the ability to exercise the degree of control over its systems which was consistent with its status as a licensee. *Motorola* at ¶17. The Bureau also found that the agreement required Motorola to perform its functions pursuant to the supervision and instruction of Comven and that if Motorola failed to comply with this provision Comven could terminate the agreement. *Motorola*, ¶¶19-20; *Public Notice*, 64 RR 2d at 841.

55. More recently *Implementation of Sections 3(n) and 332 of the Communications Act*, *supra*, recognized that different criteria had been applied to transfer of control questions involving private and common carriers and prospectively adopted the *Intermountain* test for both such services.

56. In this case, we find that whether judged by the *Motorola* test or with reference to the *Intermountain* criteria,

Sobel has not retained control of the licensed facilities. Central to the analysis is that Sobel does not have the requisite proprietary interest in the licensed facilities. Unlike Comven, Sobel did not purchase the stations' equipment or finance it independently of Kay. Rather, Kay owns the stations' equipment and has made the corresponding capital investment. For the reasons set forth in paragraph 49, *supra*, we find, as did the ALJ, that the terms of the lease give Sobel essentially no proprietary interest in the equipment. Moreover, as described in 50, *supra*, the purchase option gives Kay a further proprietary interest in the stations and considerable leverage over Sobel, who could be divested of the stations by Kay under its provisions. By contrast, Sobel can neither terminate the agreement nor sell the stations. Kay's payment of financial obligations (*see* paragraph 39, *supra*) and the division of revenues (*see* paragraphs 44-45, *supra*) are entirely consistent with Kay's proprietary interest.

57. Moreover, the record before us refutes the contention that Kay operates the licensed facilities under Sobel's "supervision and instruction." Our examination of the record relating to policy decisions indicates that Sobel consistently defers to Kay, which indicates, at best, the absence of any positive exercise of authority in this area and, at worst, a wholesale surrender of such authority to Kay. *See* paragraph 31, *supra*.

58. Thus, in light of both *Intermountain* and *Motorola*, we find that Sobel has failed to retain the requisite degree of control consistent with his claimed status as a licensee. We therefore conclude that he has violated 47 U.S.C. § 310(d).

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V. MISREPRESENTATION/LACK OF CANDOR

59. As noted above (Paragraph 3, *supra*), when the Commission designated Kay's licenses for hearing on December 13, 1994, it found that information available indicated that Kay may have conducted business under the name of Marc Sobel dba Airwave Communications. On January 25, 1995, Kay filed with the ALJ[4] a pleading entitled "Motion to Enlarge, Change, or Delete Issues," in which he asked among other things that any reference to Sobel's licenses should be deleted from the hearing designation order. 12 FCC Rcd at 22893 ¶49; WTB Exh. 44 at 4-5. The motion was supported by an affidavit by Sobel dated January 24, 1995. WTB Exh. 43. The ALJ found that Kay received drafts of the motion and affidavit from his attorneys, Brown & Schwaninger and that he called Sobel to tell him that there was an affidavit "that my attorneys wanted him to read. And, if correct, execute it." 12 FCC Rcd at 22893 ¶50. Kay and Sobel had a face-to-face meeting at which Kay asked Sobel to sign the affidavit. Sobel did so without making any changes or additions, although he was aware of his right to do so. *Id.*

60. The affidavit stated:

> I, Marc Sobel, am an individual, entirely separate and apart in existence and identity from James A. Kay, Jr. Mr. Kay does not do business in my name and I do not do business in his name. Mr. Kay has no interest in any radio station or license of which I am the licensee. I have no interest in any radio

4. Kay had earlier filed a version of the pleading with a supporting affidavit by Sobel with the Commission.

> station or license of which Mr. Kay is the licensee. I am not an employer or employee of Mr. Kay, am not a partner with Mr. Kay in any enterprise, and am not a shareholder in any corporation in which Mr. Kay holds an interest. I am not related to Mr. Kay in any way by birth or marriage.

12 FCC Rcd at 22893-94 ¶51.

61. The ALJ found that the affidavit and pleading did not provide any description of the actual relationship between Sobel and Kay, although it was purportedly prepared in part because Sobel believed that the Commission was delaying the processing of his pending application because it was "confused" about the relationship between Sobel and Kay. 12 FCC Rcd at 22894-95 ¶¶52-53. The ALJ rejected as false the statement in the affidavit that Kay had no "interest" in stations or licenses assertedly held by Sobel. The ALJ did not credit Sobel's attempts to reconcile this statement with the fact that Kay owned the stations' equipment, had an option to purchase the stations, and had a stake the stations' revenues, and held that this arrangement constituted "a fair amount of interest." *Id.* at 22895-96 ¶56-58, 22901 ¶73. The ALJ concluded that the affidavit was intended to "ward off" the Commission from being apprised of the true nature of the Kay-Sobel business relationship and that it therefore lacked candor. *Id.* at 22901 ¶73.

62. The ALJ also found other instances in which Sobel lacked candor before the Commission. The ALJ faulted Sobel for not voluntarily disclosing the Management Agreement to the Commission until requested to do so in a letter of inquiry. 12 FCC Rcd at 22897 ¶62, 22901-02 ¶74. The ALJ found that Sobel could "ill afford" to disclose the document, which was

intended to fully describe the relationship between Sobel and Kay. *Id.*

63. The ALJ also took issue with a December 6, 1994 letter that Sobel sent to FCC staff member Gary Stanford at the Commission's Gettysburg, Pennsylvania facility regarding the Commission's failure to process Sobel's pending applications and requests. 12 FCC Rcd at 22897-98 ¶63, 22902 ¶75. The letter stated:

> I can only assume that I have been "blacklisted" by Mr. [Deputy Chief of the FCC's Gettysburg Office of Operations W. Riley] Hollingsworth and am having my applications held, my customers' applications held, and my finder's preference requests ignored due to my association with Mr. Kay. Contrary to whatever beliefs that may be held by Mr. Hollingsworth, which have resulted in his taking unwarranted actions against me, I would like to assure you that I am an *Independent* Two Way Radio Dealer. I am *not* an employee of Mr. Kay's or of any of Mr. Kay's companies. I am not related to Mr. Kay in any way. I have my own office and business telephone numbers. I advertise my own company name in the Yellow Pages. My business tax registration and resale tax permits go back to 1978 — long before I began conducting any business whatsoever with Mr. Kay—the apparent target of Mr. Hollingsworth.

WTB Exh. 46. The ALJ faulted Sobel for failing to explain his relationship with Kay and for asserting, without reservation, his independence from Kay.

64. Finally, the ALJ found lack of candor in responses to application return notices (which are sent to indicate problems with land mobile applications) prepared by Kay for Sobel. 12 FCC Rcd at 22898-99 ¶64, 22902 ¶76 The ALJ noted that on customer invoices attached to the responses, the name and address of Kay's business, Lucky's Two-Way Radios, had been blacked out before they were submitted to the Commission. The ALJ found that this was done to conceal the relationship between Sobel and Kay from the Commission.

65. The ALJ concluded that the above findings indicate that Sobel consistently avoided disclosing the full nature of his relationship with Kay to the Commission and intended to deceive and mislead the Commission as to this relationship. The ALJ believed that this reflected serious misrepresentation and lack of candor. 12 FCC Rcd at 22902 ¶¶77-78.

66. In their exceptions, Sobel and Kay deny that the January 24, 1995 affidavit contained any misrepresentation or lack of candor. They claim that the affidavit was justified in stating that Kay had no "interest" in the stations, that Sobel was not Kay's "employee," and that Sobel did not do business "in Kay's name." Sobel and Kay contend that the affidavit reflected no intent on the part of Sobel to mislead the Commission. They assert that Sobel was merely trying to correct the Commission's misimpression that Sobel was an alter ego of Kay and that there was no need to explain the nature of their relationship any further. In any event, they submit that their attorneys, Brown & Schwaninger, drafted the affidavit and assured Sobel that it complied with Commission rules.

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67. Sobel and Kay also deny that any other misrepresentations or lack of candor occurred. As to the Management Agreement, they contend that they would not have reduced the agreement to writing if they intended to conceal its terms from the Commission. They further contend that Sobel did not file the affidavit and thus had no reason to file the Management Agreement, which, in any event, he thought had been filed. They point out that Kay disclosed the agreement during discovery on March 24, 1995. Concerning the Stanford letter, Sobel argues, as he did with respect to the affidavit, that he was merely trying to disabuse the Commission of the idea that he was Kay's alter ego and had no reason to further elaborate upon the nature of his acknowledged "association" with Kay. Lastly, Sobel maintains that he did not delete Kay's business name from the application return responses and did not consider it important that Kay apparently had.

68. The Bureau supports the ALJ's findings of misrepresentation and lack of candor. According to the Bureau, Sobel knew that the Commission was confused about the relationship and that the Commission would want an accurate description of that relationship. The Bureau argues that the statements that Kay had no "interest" in the stations and that Sobel was not Kay's "employee" were false or at least misleading. The Bureau finds no evidence that Sobel actually relied on advice of counsel.

69. The Bureau considers it suspicious that the parties supposedly drafted the Management Agreement in response to Commission confusion about the Sobel-Kay relationship and then did not voluntarily disclose it. The Bureau considers the Stanford letter and the responses to the application return notices misleading.

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70. We find that Sobel's January 24, 1995 affidavit was lacking in candor. Although Sobel testified that he intended merely to deny that he was an alter ego of Kay (Tr. 142-43), the affidavit makes several specific factual assertions about the relationship between Sobel and Kay. Most notably, the affidavit states that "Mr. Kay has no interest in any radio station or license of which I am the licensee." WTB Exh. 43. As our discussion under the transfer of control issue makes clear, we find that Kay had substantial interests in the Management Agreement stations. He owned the stations' equipment, he was entitled to a share of the stations' revenues, and held purchase options for the stations. We find that Sobel's attempt at the hearing to justify the representation as referring only to "ownership of the license" (Tr. 147) is an unreasonably restrictive use of the word "interest." For example, we find wholly unpersuasive Sobel's self-serving explanation that because Kay leased the station's equipment to Sobel (*see* paragraph 49, *supra*), Kay did not have an interest in the equipment. Tr. 147.

71. Moreover, the record indicates that Sobel was aware of the questionable nature of the representation. Sobel admitted that:

> The word interest—I thought about the word interest, because it was the only thing that in here might have been questionable, but it was in regards to the license and I didn't give it much thought, to be honest with you.

Tr. 156-57. Kay, in turn, acknowledged that Sobel had asked him about "ownership as in a partnership or ownership of

stock, *as having a direct financial stake in something*. Being an owner or a stockholder or a direct party to something." Tr. 371 (Emphasis added.). Sobel acknowledges that he understands that Kay has a direct financial stake in the stations. Tr. 150.

72. Aside from the statement about "interest," the affidavit contains other statements that while perhaps technically correct tend to be misleading. The affidavit states: "I am not an . . . employee of Mr. Kay. . . . " WTB Exh. 43. As Sobel testified, that statement is accurate only because there is a technical distinction between an "employee" and an "independent contractor," in which capacity Sobel has long served Kay. Tr. 150-51, 247. The affidavit also states: I . . . am not a partner with Mr. Kay in any enterprise. . . ." WTB Exh. 43. That statement is also true only if a distinction is made between the technical legal definition of "partner" and the more colloquial usage. Thus, Sobel testified: "You can agree to split something without becoming a partnership." Tr. 151-52. The affidavit states: "I do not do business in [Mr. Kay's] name." WTB Exh. 43. As Sobel explained, that statement is true in the sense that Sobel does not conduct a business using Kay's name. Tr. 15-53. However, the Management Agreement stations, which are licensed to Sobel, are marketed by Kay under his own name as part of his business. *Id.*

73. All told, the affidavit leaves the impression that, as the motion it supported argues: ". . . Kay has no interest in any license or station in common with Marc Sobel. . . ." WTB Exh. 44 at 4. In the context of the Management

Agreement stations, that impression is wholly misleading.[5] In this regard, we reject the suggestion that, because the hearing designation order erred in treating Sobel as an alter ego of Kay, it was permissible to be misleading about the true relationship between Sobel and Kay in challenging the designation order. As Sobel acknowledged, he understood that the Commission would "eventually" want to know about the actual relationship between Sobel and Kay. Tr. 143, 156, 301. There is no justification for him to withhold this information even if he expected that the Commission would ultimately find it out. As the courts have stated:

> . . . the Commission must rely heavily on the completeness and accuracy of the submissions made to it, and its applicants in turn have an affirmative duty to inform the Commission of the facts it needs in order to fulfill its statutory mandate. This duty of candor is basic and well known.

RKO General, Inc. v. FCC, 670 F.2d 215, 232 (D.C. Cir. 1981).

> As a licensing authority, the Commission is not expected to "play procedural games with those who come before it in order to ascertain the truth"

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5. In view of this finding, we do not believe that our analysis places excessive weight on our interpretation of any ambiguous word, as was found in Luthern Church-Missouri Synod v. FCC, 141 F.3d 344, 356 (D.C. Cir. 1998). Rather, we focus on the discrepancy between the reasonable interpretation that a reader would give to the affidavit and the facts as fully disclosed.

> . . . . and license applicants may not indulge in common-law pleading strategies of their own devise.

Id. at 229.

74. We reject the argument that the affidavit does not disclose deceptive intent. The record indicates that the parties drafted the Management Agreement because they learned of the forthcoming hearing designation order and realized the need to put the details of their relationship in writing. Tr. 261-63, 299-301. In view of this circumstance, the failure of the affidavit to be forthcoming about this relationship and the misleading character of the affidavit must be regarded as deliberate. (Sobel's testimony that he believed the Management Agreement had been submitted along with the motion is unsupported by the record. Tr. 303.) ". . . *[D]eliberate* failures to produce information can result in disqualification for lack of candor." *Garden State Broadcasting Limited Partnership v. FCC*, 996 F.2d 386, 393 (D.C. Cir. 1993). (Emphasis in the original.)

75. We also reject Sobel's attempt to rely on advice of counsel. Although the affidavit was originally drafted by their attorneys, Brown & Schwaninger (Tr. 154), Sobel and Kay acknowledge that Sobel reviewed the affidavit, discussed it with Kay, and understood that he could correct or supplement it. Tr. 140-41, 156, 161, 371. We find that he could appreciate its nature. Advice of counsel does not excuse a clear breach of duty by a licensee. *See RKO General, Inc. v. FCC*, 670

F.2d at 231.[6] Moreover, we note that in the December 4, 1994 letter to Gary Stanford, which Sobel composed himself (Tr. 158), Sobel adopted a similar line. He assured Stanford that he was an "*Independent* Two Way Radio Dealer." WTB Exh. 46 at 1 (Emphasis in the original). We find wholly unpersuasive his attempt to justify this statement in the context of the Management Agreement stations. He testified: "I made a deal with [Kay], but that does not make us dependent on each other. I am an independent radio dealer." Tr. 159. Sobel, however, ignores the obvious implication of his representation that his stations are operated and/or marketed independently of Kay, which they are not. For example, in the Stanford letter, Sobel specifically asserted: "I advertise under my own company name in the Yellow pages." WTB Exh. 46 at 1. The Management Agreement stations are, however, marketed under Kay's name, not Sobel's. Although the Management Agreement was subsequently disclosed during discovery in the Kay proceeding, Sobel did not disclose it in his correspondence with Stanford, even though disclosure would have served to clarify Sobel's relationship with Kay. We believe this matter is relevant to the designated issue because it confirms the existence of a pattern of conduct. *See Ismail v. Cohen*, 706 F. Supp. 243, 252-53 (S.D.N.Y. 1989); Fed. R. Evid. 404(b).[7]

6. Because Sobel was personally involved in the representations and fully aware of counsel's conduct, his reliance on Rainbow Broadcasting Co., FCC 98-85 (Aug. 5, 1998), as set forth in Sobel's Further Motion for Leave to File Supplement [to] Exceptions is unavailing.

7. As to another matter, however, we accord no significance. The record shows that Kay prepared responses to application return

(Cont'd)

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VI. SANCTIONS

76. The ALJ concluded that Sobel was unfit to remain a Commission licensee. 12 FCC Rcd at 22902 ¶78, 22903 ¶80. He found that Sobel transferred control of the Management Agreement stations without authorization, made misrepresentations, and lacked candor about the transfer of control. He deemed Sobel's misconduct willful and repeated. He found that Sobel cannot be relied on to be forthcoming with the Commission and to comply with rules and policies. He therefore revoked Sobel's licenses, denied his applications, and dismissed his finder's preference requests.

77. In their exceptions, Sobel and Kay argue that disqualification is not appropriate on the facts of this case. Sobel observes that he has no past record of misconduct. Sobel and Kay deny that any misrepresentation or lack of candor occurred here and claim that the Commission does not customarily disqualify licensees for an unauthorized transfer of control unaccompanied by dishonesty. Kay suggests that if any sanction is appropriate it should be a forfeiture. Sobel urges that any disqualification should be limited to the Management Agreement stations.

(Cont'd)

notices on Sobel's behalf. Tr. 87-88. On customer invoices attached to responses, the name of Kay's business, "Lucky's Two-Way Radios," is blacked out. *Id.*; WTB Exhs. 19-23. However, Kay, not Sobel, took the initiative in marking out the information. Tr. 337-39. The record does not indicate that, at that time in 1993, Sobel was aware that the deleted information might be of a detrimental nature.

78. The Bureau fully supports the ALJ. It argues that revocation of the Management Agreement stations is an insufficient sanction because they have not been profitable for Sobel.

79. We have found that Sobel violated 47 U.S.C. § 310(d) by transferring control of the Management Agreement stations without Commission authorization and that Sobel lacked candor about the status of these stations. An unauthorized transfer of control accompanied by deception reflects serious misconduct implicating a licensee's most basic obligations. In the past, we have disqualified licensees who have committed this combination of misconduct. *See Deer Lodge Broadcasting, Inc.*, 86 FCC 2d 1066, 1097 n.164 (1981).

80. In specifying the appropriate sanction here, we are mindful that the misconduct found did not affect all of Sobel's licensed facilities, but only the Management Agreement stations (*i.e.*, Sobel's conventional SMR stations on the 800 MHz band). The record indicates that Sobel has operated land mobile stations, including his facilities on the 450 MHz and 470-512 MHz bands, for over 20 years without any evidence of misconduct. The record here gives no indication that Sobel failed to exercise appropriate control over these facilities or that he lacked candor in any representation made about them. Thus, the question arises whether the sanctions imposed here should extend to the uninvolved stations. In this regard, deterrence is an important element of the character qualifications process. *See Character Qualifications*, 102 FCC 2d 1179, 1128 ¶103 (1986). Sanctions imposed on licensees may deter future misconduct

by the person involved and by others. In the context of broadcasting, we observed that: "Suffering the loss of one station, with the costs thereby imposed will likely serve to deter all but the most unrepentant from serious future misconduct." *Id.* In this case, we find that loss of Sobel's interests involving the 800 MHz band alone will be an adequate deterrent. We will therefore revoke Sobel's licenses for facilities on the 800 MHz band, deny his pending 800 MHz applications, and dismiss his finder's preference requests for such facilities. In light of these sanctions, we find it unnecessary to impose a forfeiture against Sobel. We will direct the Bureau to process Sobel's remaining applications.

VII. ORDERING CLAUSES

81. ACCORDINGLY, IT IS ORDERED, That, the Petition to Defer and Consolidate Consideration, filed March 2, 1999, by Marc D. Sobel; and the Supplement to Petition to Defer and Consolidate Consideration, filed March 2, 1999, by Marc D. Sobel ARE DISMISSED as moot.

82. IT IS FURTHER ORDERED, That, because oral argument would not materially assist the Commission in the resolution of this proceeding, the Requests for Oral Argument, filed January 12, 1998, by James A. Kay, Jr. and January 29, 1998, by Marc D. Sobel d/b/a Air Wave Communications ARE DENIED.

83. IT IS FURTHER ORDERED, That, Wireless Telecommunications Bureau's Reply Brief, having been timely served by mail before January 27, 1998, the Joint

Motion to Strike [the reply brief as untimely], filed January 29, 1998 by Marc D. Sobel d/b/a Air Wave Communications and James A. Kay, Jr. IS DENIED.

84. IT IS FURTHER ORDERED, That the Motion for Leave to File Supplement to Consolidated Brief and Exceptions, filed May 28, 1998, and the Further Motion for Leave to File Supplement [to] Exceptions, filed October 2, 1998, by Marc D. Sobel d/b/a Air Wave Communications ARE GRANTED in part and, because further briefing would not materially assist the Commission, ARE DENIED in part.

85. IT IS FURTHER ORDERED, That, the Consolidated Brief and Exceptions, filed by Marc D. Sobel d/b/a Air Wave Communications, and James A. Kay, Jr.'s Consolidated Brief and Exceptions to the Initial Decision of Administrative Law Judge John M. Frysiak, both filed January 12, 1998, ARE GRANTED in part and ARE DENIED in part, and the Initial Decision of Administrative Law Judge John M. Frysiak, FCC 97D-13 (Nov. 28, 1997) (12 FCC Rcd 22879) IS MODIFIED as set forth above.

86. IT IS FURTHER ORDERED, That the following licenses of Marc D. Sobel and/or Marc D. Sobel d/b/a Air Wave Communications ARE REVOKED: KNBT299, KRU576, WNWB334, WNXL471, WNYR424, WNZS492, WPAD685, WPCA891, WPCZ354, WPDB603, WPFF529, WPFH460, WPCG780, WNPY680, WNZC764.

87. IT IS FURTHER ORDERED, That the following applications of Marc D. Sobel and/or Marc D. Sobel d/b/a Air Wave Communications ARE DENIED: File Nos. 670861, 697577, 501542, 666673, 614567.

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88. IT IS FURTHER ORDERED, That the following requests for finder's preferences of Marc D. Sobel and/or Marc D. Sobel d/b/a Air Wave Communications ARE DISMISSED: 93F600, 93F622, 93F683, 93F758, 93F323.

89. IT IS FURTHER ORDERED, That the Wireless Telecommunications Bureau IS DIRECTED to proceed with the processing of Sobel's other pending applications.

90. IT IS FURTHER ORDERED, That the licensee IS AUTHORIZED to continue operation of the stations mentioned in paragraph 86 until 12:01 A.M. on the ninety-first day following the release date of this decision to enable the licensee to conclude the stations' affairs; PROVIDED, HOWEVER, that if the licensee seeks reconsideration or judicial review of our action revoking its license, it is authorized to operate the stations until final disposition of all administrative and/or judicial appeals.

91. IT IS FURTHER ORDERED, That the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX H — CONSOLIDATED SEPARATE STATEMENT OF COMMISSIONER KEVIN J. MARTIN, CONCURRING IN PART AND DISSENTING IN PART

Re: *James A. Kay, Jr., Licensee of One Hundred Fifty Two Part 90 Licenses in the Los Angeles, California Area*, Decision, WT Docket No. 94-147; *Marc Sobel and Marc Sobel d/b/a Air Wave Communications, Licensee of Certain Part 90 Stations in the Los Angeles Area*, Decision, WT Docket No. 97-56

I dissent in large part from this item. I am unwilling to approve, based on the conflicting and confusing record before us, the determination that James A. Kay, Jr. improperly failed to respond to requests for information and that Kay and Marc Sobel lacked candor in filings they made to the Commission. In the information request decision, the Commission reverses an ALJ's explicit findings that Kay acted reasonably in the face of a demanding inquiry by the Bureau - findings that are ordinarily accorded great deference. In the lack of candor decision, upon which two ALJs reached opposite conclusions, the Commission essentially sides with the first ALJ, even though he did not have accurate information on all of the relevant facts. In my view, the Commission does itself a disservice by making these decisions on the cold record before it. At the very least, the Commission should have referred this proceeding to a new ALJ to reconcile the conflicting decisions and make definitive findings.

Appendix H

I. Failure To Respond to Commission Inquiries

This case began as an investigation into whether Kay was falsely reporting the number of mobile units he served in order to avoid certain channel sharing and recovery rules. Having received several complaints making such allegations, the Wireless Bureau served Kay with a request for information. A lengthy exchange ensued, in which Kay and the Bureau wrestled over what information Kay would provide and when he would provide it. Kay's actions during the course of this exchange are the basis for the Commission's determination that Kay improperly failed to respond to the Bureau's inquiries in violation of 47 U.S.C. § 308(b) and 47 C.F.R. § 1.17.

The Commission makes this determination in the face of a contrary decision and express findings by the ALJ. That ALJ, Judge Chachkin, found that "the Bureau was engaged in a fishing expedition with the hope that something would turn up," that "Kay was being asked to provide virtually every detail regarding the operation of his business[,] . . . include[ing] sensitive information such as his entire customer list and details regarding the technical configuration of each of his customers' system[s]," and that "all of Kay's reasonable requests for modification of the extremely broad inquiry were arbitrarily ignored." *James A. Kay, Jr., Licensee of One Hundred Fifty Two Part 90 Licenses in the Los Angeles, California Area*, Initial Decision of Chief Administrative Law Judge Joseph Chachkin, WT Docket No. 94-147, FCC 99D-04, ¶ 179 ("Chachkin Decision"). In addition, Judge Chachkin found that the Bureau's request for information "was received by Kay only two weeks after

the Northridge earthquake, a devastating natural disaster that did substantial damage to his business and personal residence" and that, ultimately, "Kay turned over some 36,000 documents." Id. ¶ 180. Finally, Judge Chachkin ruled that Kay's actions were based on "legitimate concerns in Kay's mind whether the data sought would be kept confidential" (id. ¶ 181), because, among other things, Kay's competitors had received a copy of the Bureau's inquiry letter to Kay (id. ¶ 29) and the Bureau at one point demanded 50 copies of Kay's response (id. ¶ 181).

In my view, the Commission goes too far in reversing Judge Chachkin's conclusions. There can be no question that Kay and the Bureau were engaged in a heated dispute. Judge Chachkin made a number of factual determinations to resolve that dispute and determine that Kay did not violate the statute or Commission rules. In such situations, I am reluctant to reverse an ALJ's determinations based on a cold record. It is well established that, generally, the initial trier of fact is "closer to the course of the litigation," *Bonds v. District of Columbia*, 93 F.3d 801, 808 (D.C. Cir. 1996), and "has a better 'feel' . . . for the litigation" than a reviewing tribunal, Founding Church of Scientology v. Webster, 802 F.2d 1448, 1457 (D.C. Cir. 1986). Thus, the Commission routinely defers to the ALJ on these sorts of decisions. *See, e.g., Applications of WWOR-TV, Inc. for Renewal of License of Station WWOR(TV), Secaucus, New Jersey and Garden State Broadcasting Limited Partnership for Construction Permit, Secaucus, New Jersey*, Memorandum Opinion and Order, 5 FCC Rcd 4113, ¶ 11 (1990) ("[W]e are reluctant to reverse the ALJ, to whom broad discretion is ceded in ordering discovery. . . ."); *Applications of Mid-Ohio/Capitol*

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Communications Limited Partnership et al. for Construction Permit for a New FM station on Channel 298A in Columbus, Ohio, Memorandum Opinion and Order, 4 FCC Rcd 8125, ¶ 6 (1989) ("[T]he Commission routinely entrusts the determination of the scope of such discovery in comparative hearings to the broad discretion of the ALJ."). Indeed, this principle of deference extends well beyond the FCC; in the similar arena of discovery disputes, appellate tribunals traditionally afford great deference to the decisions of the trial court. *See, e.g., United States v. Davis*, 244 F.3d 666, 670 (8th Cir. 2001) ("The district court has broad discretion in imposing sanctions on parties for failing to comply with discovery orders."); accord Bonds, 93 F.3d at 807. Accordingly, on this record, I would not have reversed the ALJ's decision.

II. Lack of Candor

The Commission's lack of candor decisions against Kay and Sobel stem from other events in this case. During the course of the Bureau's investigation of Kay, it received information indicating that Kay may have conducted business under several other people's names, including Marc Sobel's. The Commission thus included Sobel's licenses in the order designating Kay's licenses for hearing. Kay filed a motion to remove Sobel's licenses from the hearing designation and attached an affidavit signed by Sobel stating that Kay had no interest in any of Sobel's stations. Based on this submission, the Commission removed Sobel's licenses from the Kay proceeding.

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The Bureau subsequently discovered that Kay operated a number of Sobel's stations pursuant to a management agreement. Accordingly, the Commission designated Sobel's licenses for hearing, asking whether Sobel had engaged in misrepresentation or lack of candor. The ALJ assigned to Sobel's case, Judge Frysiak, concluded that Sobel's actions showed a lack of candor. Judge Frysiak based that determination on, among other things, statements in the affidavit and on Sobel's apparent failure to provide the Bureau the management agreement in a timely manner.

However, Judge Chachkin, in later reviewing the same conduct in Kay's case, came to the opposite conclusion. Judge Chachkin found that Kay understood the affidavit's statement that Kay had no interest in any of Sobel's stations to mean that Kay had no ownership interest in any licenses that were issued to Sobel. Chachkin Decision ¶ 216. Judge Chachkin determined that "Kay was specifically advised, by counsel, that . . . the management agreement did not constitute an interest." Id. ¶ 172. He thus concluded that "Kay's testimony as to what he meant by the word 'interest' and the phrase 'stations or licenses' is entirely reasonable and credible." Id. ¶ 216.

Judge Chachkin also found that Kay's and Sobel's actions showed no intent to deceive the Bureau or conceal the management agreement. He pointed out that Kay and Sobel provided the management agreement to the Bureau just two months after they filed the challenged motion and accompanying affidavit, long before anyone raised any questions about lack of candor. Id. ¶ 217.

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Finally, Judge Chachkin addressed Judge Frysiak's prior decision on the lack of candor issue and concluded that Judge Frysiak had been misled by the Bureau. Judge Chachkin explained that, although Kay had provided the Bureau a copy of the management agreement in March of 1995, the Bureau represented to Judge Frysiak that no copy was provided until late 1996. Id. ¶ 210. "There is no doubt," Judge Chachkin concluded, "that [Judge Frysiak's] ultimate conclusion that 'Sobel made misrepresentations and lacked candor . . .' was based on his erroneous assumption as to when the Agreement was given to the Bureau." Id. ¶ 210.

Based on these conflicting decisions and on Judge Chachkin's view that Judge Frysiak was misled, I cannot support this decision. As the Commission acknowledges, determinations of credibility must rest in large part on factual determinations made by an ALJ. I am unable, on the record before us, to reconcile the ALJ's conflicting decisions and determine that Judge Frysiak was not misled.[1] Particularly given the severity of the sanctions at issue, I would not find that Kay and Sobel lacked candor.

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1. I also take issue with the Commission's conclusion that Judge Frysiak would not have made a different decision had he known Kay and Sobel provided the Bureau a copy of the management agreement in March of 1995, long before lack of candor was an issue. Judge Frysiak's decision explicitly rests in part on the determination that "even though the Management Agreement fully disclosed their relationship; Sobel did not voluntarily submit it to the Commission until requested by the Commission to do so in [1996]." Marc Sobel and Marc Sobel d/b/a Air Wave Communications, Licensee of Certain Part 90 Stations in the Los Angeles Area, Decision, WT Docket No. 97-56, FCC 97D-13, ¶ 74. While this may not have been the

(Cont'd)

III. Conclusion

At best, this is a case of conflicting opinions by ALJs that ought to be remanded to a third ALJ to reconcile their determinations. Even worse, however, this case involves allegations that Commission staff misled a judge into reaching an erroneous conclusion. While I am confident that Commission staff engaged in no misconduct in this case, we do them a disservice by depriving them of an opportunity, in a new hearing, to explain what occurred. Such a hearing would defend the reputation of our staff and ensure the integrity of our process. Thus, for all of these reasons, the more reasonable course would be to refer this case for a hearing in front of a new ALJ. Accordingly, I dissent from parts IV, VII, VIII, and IX of the Kay Order and from parts V, VI, and VII of the Sobel Order. I concur with respect to the other parts of these Orders.

(Cont'd)

largest factor in Judge Frysiak's decision, I find it impossible to assess its impact after the fact. I do not understand how my colleagues, on the record before us, can make such a conclusion on Judge Frysiak's state of mind.

APPENDIX I — INITIAL DECISION OF CHIEF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN OF THE FEDERAL COMMUNICATIONS COMMISSION RELEASED SEPTEMBER 10, 1999

Before the
Federal Communications Commission
Washington, D.C. 20554

WT DOCKET NO. 94-147

In the Matter of

JAMES A. KAY, JR.

Licensee of One Hundred Fifty Two Part 90
Licenses in the Los Angeles, California Area

Appearances

Robert J. Keller and *Aaron Shainis*, on behalf of James A. Kay, Jr.; and *William H. Knowles-Kellett* and *John J. Schauble*, on behalf of the Wireless Telecommunications Bureau.

INITIAL DECISION
OF
CHIEF ADMINISTRATIVE LAW JUDGE
JOSEPH CHACHKIN

Issued: September 7, 1999 Released: September 10, 1999

Appendix I

Preliminary Statement

1. James A. Kay, Jr. (Kay), is the licensee of 152 stations in the greater Los Angeles area. WTB Ex. 290. By *Order to Show Cause, Hearing Designation Order, and Notice of Opportunity For Hearing for Forfeiture*, 10 FCC Rcd 2062 (released December 13, 1994) (Show Cause Order), the Commission commenced the instant proceeding to determine ultimately whether the licenses for these stations should be revoked.[1]

2. The *Show Cause Order* in this case designated eight issues, located at subparagraphs 10(a) through 10(h), for resolution by the Presiding Administrative Law Judge:

> (a) To determine whether James A. Kay, Jr. has violated Section 308(b) of the Act and/or Section 1.17 of the Commission's Rules, by failing to provide information requested in his responses to Commission inquiries;
>
> (b) To determine whether James A. Kay, Jr. has willfully or repeatedly operated a conventional

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1. The original caption in the HDO specified one hundred sixty-four Party 90 licenses. Attachment A to the HDO set forth a list of the 164 subject call signs. In addition to stations licensed to Kay or to companies owned by him, this list also included one authorization held by Multiple M Enterprises, Inc., HDO, Attachment A, item 153, and eleven authorizations held by Marc Sobel. HDO, Attachment A, items 154-164. In May 1996, the Commission modified the HDO by deleting the facilities licensed to MME and Sobel and by changing the caption to specify one hundred fifty two Part 90 licenses. *Order* (FCC 96-200), 11 FCC Rcd 5324 (1996).

station in the trunked mode in violation of Section 90.113 of the Commission's Rules;

(c) To determine if Kay has willfully or repeatedly violated any of the Commission's construction and operation requirements in violation of Sections 90.115, 90.157, 90.313, 90.623, 90.627, 90.631, and 990.633 of the Commission's Rules;

(d) To determine whether James A. Kay, Jr. has abused the Commission's processes by filing applications in multiple names in order to avoid compliance with the Commission's channel sharing and recovery provisions in violation of Sections 90.623 and 90.629;

(e) To determine whether James A. Kay, Jr. willfully or maliciously interfered with the radio communications of other systems, in violation of Sections 333 of the Act;

(f) To determine whether James A. Kay Jr. has abused the Commission's processes in order to obtain cancellation of other licenses;

(g) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether James a. Kay, Jr. is qualified to remain a Commission licensee;

(h) To determine if any of James A. Kay, Jr.'s licenses have automatically cancelled as a result

> of violations listed in subparagraph (c) pursuant to Sections 90.155, 90.157, 90.631 or 90.633 of the Commission's rules; and [sic]

10 FCC Rcd at 2064-65.

3. On May 31, 1966 [sic], Judge Sippel, the Presiding Judge, issued a summary decision whereby he, *inter alia*, disqualified Kay and revoked all of his Title III authorizations. *Summary Decision of Administrative Law Judge Richard L. Sippel*, 11 FCC Rcd 6585 (1996). Kay appealed this ruling, and its effectiveness was automatically stayed pursuant to Section 1.276(d) of the Commission's Rules. 47 C.F.R. § 1.276(d). In February 1997 the Commission reversed the summary decision and remanded the case for hearing. *James A. Kay, Jr.*, 12 FCC Rcd 2898 (OGC 1997).

4. By *Memorandum Opinion and Order*, FCC 98M-94 (released July 15, 1998), issues (b) and (f) were resolved in Kay's favor by summary decision. Similarly issue (d), with respect to Sections 90.629, and 90.627, was resolved in Kay's favor. *Id.* The order notes that the reference to Section 90.629 of the Commission's Rules should have been to 90.627. *Id.* (Section 90.627 of the Commission's Rules is still properly the subject of subparagraph 10(c)).

5. By *Memorandum Opinion and Order*, FCC 98M-15 (released February 2, 1998), the Presiding Judge added the following issues:

> To determine, based on the findings and conclusions of *Initial Decision* FCC 97D-13

reached in WT Docket No. 97-56 concerning James A. Kay, Jr.'s (Kay) participation in an unauthorized transfer of control, whether Kay is basically qualified to be a Commission licensee.

To determine whether James A. Kay, Jr. misrepresented facts or lacked candor in presenting a Motion To Enlarge, Change, or Delete Issues that was filed by Kay on January 12, 1995, and January 25, 1995.

To determine whether in light of the evidence adduced under the aforementioned added issues whether James A. Kay, Jr. is qualified to hold a Commission license.

6. By *Order*, FCC 98-274 (released October 19, 1998), the Commission ordered the appointment of a new Administrative Law Judge to preside over this case. By *Order*, FCC 98M-122 (released October 30, 1998), Chief Judge Joseph Chachkin appointed himself to preside over the proceeding. The evidentiary admissions session was held on November 30, 1998. Hearing sessions were held in Washington, D.C., on December 21, 22, 23, 28, 29, and 30, 1998; and January 11, 12, 13, 14, 19, and 20, 1999. The record in this proceeding was closed on January 20, 1999. Tr. 2565. Proposed findings were filed by the parties on May 10, 1999. Replies were filed on June 1, 1999.

7. In accordance with the requirements of Section 312 of the Communications Act of 1934, as amended, (the "Act") and paragraph 15 of the *Show Cause Order*, the Wireless

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Telecommunications Bureau (the "Bureau") has the burden of proceeding with the introduction of evidence and the burden of proof with respect to all issues.

Findings of Fact

General Background

8. Kay operates Part 90 land mobile radio facilities in the Los Angeles, California, area. He has been involved in the radio field since approximately 1972 or 1973. Tr. 859. He began providing two-way mobile service to others on a commercial basis in approximately 1982 to 1984. Tr. 859-860. He is the President and sole shareholder of Buddy Corp., which operates under the fictitious business name of Southland Communications. Southland is engaged primarily in the sales, service, installation, and maintenance of mobile radios and two-way mobile radios systems. He also operates a sole proprietorship under the name of Lucky's Two-Way Radio. Lucky's sells repeater service, rents repeater site space, and provides technical consulting services. Tr. 861.

9. Lucky's provides repeater service, *i.e.*, commercial mobile radio service to end users, and Southland does equipment sales, leasing, installation, and maintenance. Tr. 862. While many customers obtain their equipment from Southland and their repeater service from Lucky's, not all do. A customer might obtain radios from a source other than Southland, but obtain repeater service from Lucky's. Similarly, a customer might obtain radios from Southland, but use them with a repeater service obtained from a source other than Kay. Tr. 863. Both Lucky's and Southland are located in the same building, Kay's shop in Van Nuys. Tr. 2271.

Appendix I

Section 308(b) Issue

The Initial Section 308(b) Correspondence

10. By letter dated January 31, 1994, and directed to Kay, the Bureau requested various information pursuant to Section 308(b) of the Communications Act. WTB Ex. 1. This letter (hereinafter referred to as the "308(b) Request") stated: "The Commission has received complaints questioning the construction and operational status of a number of your licensed facilities.... The complaints allege that the *licensed* loading of your facilities does not realistically represent the *actual* loading of the facilities, thereby resulting in the warehousing of spectrum." WTB Ex. 1 at p. 1 (underlining in original). Neither the identity of the complainants nor the specifies of any alleged complaint was disclosed. *Id.*

11. The 308(b) Request directed Kay to produce a list of all Kay's customers, including "the user name, business address and phone number, and a contact person." WTB Ex. 1 at p. 2. It also sought complete details regarding the technical configuration of Kay's systems and the operations of Kay's customers, including the number of mobile units and control stations operated by each user and the number of units operated on each of Kay's stations. *Id.* In addition, the 308(b) Request asked for an alphabetical list of the call signs and licensee names for all facilities owned or operated by Kay or any companies through which he does business;[2]

2. The Bureau conceded at the hearing that it could have easily obtained from its own files the call signs and licenses issued to Kay and limited its inquiry to companies through which Kay does business. (See Tr. 2350-2354).

annotated to show what facilities are located on U.S. Forest Service land; the original license grant date for each station and the date the facility was constructed and placed into operation; copies of all U.S. Forest Service permits;[3] and an explanation for the lack of a U.S. Forest Service permit for any station located on U.S. Forest Service land. *Id.* at p. 1.

12. Kay received the letter shortly after January 31, 1994, only two weeks after the Northridge earthquake that had done extensive damage to his business and his residence. Tr. 2340-2341. He read it and he understood that it was asking him to provide the specified information. Tr. 865. Kay believed it would have been virtually impossible to have supplied the requested information at that time, partly because his business had been severely damaged by the Northridge earthquake that had occurred less than two weeks prior to the 308(b) Request, Tr. 2340-2341, and also because "[t]he request was so massive, it was impossible to deal with." Tr. 2342. Later, in response to discovery requests, Kay produced virtually all of the same information requested in the 308(b) Request. The task required more than three of his staff to devote almost three months to nothing but this project, and it also required 40 to 60 hours of his personal time to compile the information. And this was all done in 1995, after he had "more or less" put the company back together after the earthquake. Kay ultimately produced over 36,000 documents to the Bureau in discovery, and he estimates that

3. The Bureau asserted at a prehearing conference that it needed Kay's copies of the permits to compare them with copies obtained from the U.S. Forest Service. Tr. 175. Contrary to this assertion, the Bureau never obtained copies from the U.S. Forest Service, Tr. 2091-2108, and relied solely on Kay's copies.

only 2,000 to 4,000 documents less would have been required to comply with the 308(b) Request. Tr. 2355. Kay stated that during the weeks and months following the earthquake, it would have been literally impossible to have complied with the Section 308(b) Request, because he had no staff, no personal availability, and everything was in total disarray. Tr. 2355-2356.

13. When Kay received the Section 308(b) letter, he faxed it to his Washington, D.C. communications law firm, Brown & Schwaninger, to assist him in responding to the Section 308(b) letter. Brown & Schwaninger had represented Kay on FCC-related matters since the late 1980's and continued to do so until approximately mid-1995. Tr. 866, 2339. Kay instructed Brown to review and prepare a response to the letter. Tr. 2339.

14. The 308(b) Request was the first in a series of letters exchanged between the Bureau and Brown & Schwaninger.[4] The initial 308(b) Request was in a letter, dated January 31, 1994, from the Bureau, addressed to Kay, and indicating delivery via both regular mail and certified mail — return receipt requested. WTB Ex. 1.

15. Dennis C. Brown, a partner at Brown & Schwaninger, responded with a letter, dated February 16, 1994, in which he specifically sought "written assurance that any information which Kay submits . . . will be held in

4. Most of the Bureau's letters after the initial request were addressed to Dennis C Brown, Esquire, of Brown & Schwaninger, but in three instances (see WTB Ex. 4 and Kay Exs. 49 & 54) the Bureau wrote directly to Kay.

strictest confidence and will not be disclosed under any circumstances to any person who is not a Commission employee." WTB Ex. 348 at p. 1. Brown further requested that Kay be afforded immunity from any forfeiture action or criminal prosecution based on any information supplied, and asked that the running of the sixty day response period be tolled pending action on the requests set forth in the letter. *Id.* at p. 2. Kay received a copy of this letter on or shortly after February 16, 1994, but did not recall whether he saw an advance draft of it. Kay stated that upon receipt of the letter he would have read or scanned through it. Tr. 1027. Kay did not recall whether he was specifically aware that his attorneys were making the request for immunity, but "conclude[d] that my attorneys were acting in an abundance of caution on my behalf." Tr. 1028.

16. The Bureau responded with a letter, dated March 1, 1994, addressed to Brown. WTB Ex. 349. The Bureau stated that if Kay wished to have submitted material withheld from public inspection he would be required to submit such a request concurrently with the submission of the materials. The Bureau further stated that Brown's February 16, 1994, letter "is not considered a request that information submitted . . . be withheld from public scrutiny." *Id.* at p. 1. The request for immunity was summarily denied on the stated grounds that "Congress has not provided for immunity when responding to [Section 308(b)] requests." *Id.* The deadline for responding to the 308(b) Request was extended to April 14, 1994. *Id.* at p 2. Kay considered this letter to be essentially a denial of his request for confidentiality. Tr. 1029.

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17. On April 7, 1994, Brown wrote two letters to the Bureau. In the first letter (WTB Ex. 2), Brown specifically requested confidential treatment pursuant to Section 0.459 of the Commission's Rules. Brown sought confidential treatment to prevent an unwarranted invasion of privacy in that Kay was submitting (via Brown's second April 7 letter) personal information. WTB Ex. 2 at pp. 1-2. Brown also requested confidentiality on competitive grounds. The letter specifically advised the Bureau as follows:

> Mr. Kay has learned that some of his competitors have obtained copies of the [308(b) Request] and have already made competitive use of the fact of the request to disparage his reputation in the radio communications service market. Affiliates of some of Mr. Kay's competitors have informed him that his competitors intend to obtain the information which he is submitting and distribute it in the Los Angeles area in an effort to disparage him among his customers. Mr. Kay is also reliably informed that some of his competitors intend to use the information to probe for weaknesses, if any, in his business strategy, and to solicit his current customers directly.

WTB Ex. 2 at p. 2.

18. In the second letter dated April 7, 1994 (WTB Ex. 3), Brown addressed the substance of the 308(b) Request. He presented a number of legal objections and challenges to the scope of the request and the Bureau's statutory right to seek the requested information. As to some of the requested

information, Brown informed the Bureau that it already had the requested information or that Kay was not required to maintain the requested information. For example, the Bureau obviously already knew the call signs of the stations licensed to Kay as well as the dates the licenses were granted. WTB Ex. 3 at pp. 1-2. Brown challenged the Commission's jurisdiction to inquire into the status of Kay's U.S. Forest Service Permits, and he also explained that, under USFS procedures, the lack of permit as to a particular facility was not probative evidence of non-construction as the Bureau's Section 308(b) letter "presumed." *Id.* at pp. 3-4.

19. As to the specific requests for loading information, Brown stated that the request "is not sufficiently specific for [Kay] to supply the requested information." It was explained that the loading of Kay's systems fluctuates over time, from hour to hour, day to day, and season to season. *Id.* at p. 5. Brown also noted that Commission regulations in effect at the time did not require Kay to know the loading at a given point in time, but rather only when he made certain requests, *e.g.*, requests to add channels or renew facilities where the issuance of the requested authorization is subject to a certain level of loading. *Id.* at p. 6. Brown further stated that Kay had already provided the Commission with the loading information for his 800 MHz stations after the complaints alluded to the 308(b) Request had been filed. *Id.*

20. Brown's second April 7 letter also expressed grave concerns about the scope of the 308(b) Request. Brown noted that the Bureau "essentially requests that Mr. Kay tell the Commission everything about everything." He went on to state that the "request is unduly and unreasonably

burdensome in light of the local conditions of the Los Angeles market." In this connection he expressly advised the Bureau that "Kay is still spending a substantial part of each day recovering from the Northridge earthquake of earlier this year." *Id.* at p. 6.

21. Brown considered that Kay had discharged his statutory obligation under Section 308(b). Indeed, Brown expressly stated:

> By submission of the foregoing, Mr. Kay avers that he has fulfilled his obligation in accord with 47 C.F.R.§308(b) by substantively responding to the Commission's letter of inquiry in all respects, including the exercise of his right to decline an invitation to provide information when the request is outside the scope of the law. Mr. Kay stands ready to cooperate with the Commission in all respects which are reasonable calculated to forward the legitimate exercise of the Commission's authority in the fulfillment of its statutory duties. Accordingly, nothing contained herein should be deemed to be a failure by Mr. Kay to comply with all requirements of law.

WTB Ex. 3 at p. 6.

22. Kay received copies of and scanned through two letters sent by Brown & Schwaninger to the Bureau, both dated April 7, 1994 (WTB Exs. 2 & 3). Tr. 2341, 2343. He did not read them carefully, word for word, because he was, during that period, extremely busy dealing with the aftermath

of the Northridge earthquake that had occurred on January 17, 1994. During this time Kay was devoting an inordinate amount of time to earthquake recovery, assisting customers, meeting his financial obligations—all while coping with the aftershocks that continued for some six months following the main earthquake. Tr. 2343-2344. Similarly, Kay did not review word for word, nor did he carefully analyze, the Bureau's May 20, 1994 letter to Brown (WTB Ex. 6). Tr. 2356-2357. As Kay explained, while he was in the midst of recovering from the devastating earthquake, he "had assigned the task to [his] attorneys to deal with the Commission, to explain to them the situation we were in, and they were responding to it." Tr. 2357.

Kay's Concerns Regarding Confidentiality

23. Both Kay and his legal counsel had considered the Bureau's March 1, 1994, letter (WTB Ex. 349), a denial of Kay's request for confidentiality, Tr. 1028-1029; WTB Ex. 3 at p. 5. Although the Bureau held open the possibility that Kay could submit a formal request for confidentiality pursuant to Section 0.459 of the Rules, Kay understood that this request would have to be accompanied by the very materials he was seeking to keep confidential. Tr. 1029-1030. He was very much concerned about a process that required him to submit all the documents and then have the Bureau staff make an after-the-fact determination as to which documents would be publicly released. Tr. 1030-1031.[5]

5. This procedure was also problematic for Kay in terms of the scope of the Bureau's request. As Brown had pointed out in his February 16, 1994, the Bureau was seeking "essentially all of the

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Accordingly, both of the April 7, 1994, letters included copyright notices across the bottom of each page, stating as follows: "Entire contents copyright, James A. Kay, Jr. 1994. All right reserved. No portion of this document may be copied or reproduced by any means." WTB Exs. 2&3.

24. On May 11, 1994, a month after Brown's April 7 letters containing the copyright notice, the Bureau wrote a letter directly to Kay stating that information was required in response to the 308(b) Request before the Commission could process certain of Kay's pending applications. WTB Ex. 4. The Bureau stated: "Please be advised that if you claim copyright protection in your response, we require that you file 50 copies of your response . . . as well as a full justification of how the copyright laws apply, including statutory and case cites. . . ." *Id.* When Kay received this letter he "was totally incredulous." Tr. 2344. He explained:

> I knew of no reason whatsoever why the Commission would ever want 50 copies of the most confidential information of my company for any other purpose but to distribute it. We had

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records which constitute Mr. Kay's business." WTB Ex. 348 at p. 1. In order to fully and unconditionally comply with the 308(b) Request, Kay would have been required to produce virtually all of the same documents he ultimately produced to the Bureau in discovery, namely, approximately 36,000 documents which took his staff about three months to compile. Tr. 1030-1031. Responding to the 308(b) Request would have required the production of only a few thousand less documents, but it "still would have been in the mid-thirty-thousand range of documents." Tr. 1040.

> asked for confidentiality, they had refused. When we said we were going to copyright it, now they want 50 copies of it. I had dealt with the Commission before and requests of confidentiality had been routinely granted. It was customary, it was never a problem receiving confidentiality from the Commission. And, here they were denying it. Then we said, well, we have to get this somehow. We're going to copyright it and they want 50 copies. What could they possibly want 50 copies for, but to give it to exactly everybody I didn't want to have it? My competitors who are public and who knows who, anybody conceivably that asked for it. I just couldn't do that. I was flabbergasted and dismayed.

Tr. 2344-2345. Just two days later, on May 13, 1994, the Bureau sent a virtually identical letter directly to Kay, making the same request in connection with another pending application and containing the same language requesting 50 copies if Kay sought copyright protection for his response. Kay Ex. 49.

25. Kay's interpretation of Bureau's initial reaction to his requests for confidentiality was colored in part by his past dealings with the Bureau regarding casual requests for confidential treatment. Kay explained as follows:

> I know from past experience with the Commission that with extremely sensitive material the Commission has permitted licensees to loan but not submit material to the Commission. Therefore,

> the material never becomes the property of the Commission and is then returned. I had past experience with the Commission of submitting confidential materials to them, including highly sensitive, competitive material, which was handled by the Commission on that basis and was returned to me. I knew how it was handled when it was handled properly.
>
> We requested confidentiality in basically the same fashion this time, my attorneys did, as was handled in, I think it was somewhere around mid-'93, when I requested confidentiality up front, and they said yes. And I said, okay, I'll submit it. You're free to read it for the record, and please return. And the material was marked copyright, proprietary, confidential, and its return was requested, and the material was returned by the Commission, and it worked fine about six months or seven months previous to the 308(b). So I have experience with that. This time they denied confidentiality, then they wanted 50 copies, then they quoted FOIA language to me. What do you want me to believe?

Tr. 944-945. Kay was extremely concerned because the 308(b) Request was seeking "literally the entirety of the most confidential information of my company." Tr. 2342.

26. On May 17, 1994, Brown responded to the Bureau's May 11 and May 13, 1994, letters, WTB Ex. 5, and

specifically challenged the Bureau on the request for 50 copies:

> We respectfully note that we have filed the number of copies of Mr. Kay response which are required to be filed by Section 1.51 of the Commission's Rules. However, you have requested 50 additional copies . . . Since the Commission could not possibly require 50 copies for its own internal use, the only reasonable conclusion is that the Commission intends to make further circulation of Mr. Kay's response beyond the Commission. It was specifically to prevent such distribution that . . . that Mr. Kay requested confidentiality for his response and provided the Commission with notice of his copyright.

WTB Ex. 5 at p. 1.

27. In Brown's May 17, 1994, letter challenging the request for 50 copies (WTB Ex. 5), Brown reiterated some of the same legal objections to the 308(b) Request that he had set forth in his second April 7, 1994, letter (WTB Ex. 3). Brown further put forth arguments demonstrating that the information requested in the 308(b) Request was not relevant to the resolution of any of the specific pending applications addressed in the Bureau's May 11 and May 13, 1994, letters. WTB Ex. 5 at pp. 2-3. Brown suggested that progress could be made on the matter if the Bureau would request specific information concerning each of the specified applications rather than pursuing an open-ended request that essentially required Kay to produce virtually all of his business records

without any guidance as to what the Bureau was seeking or what its specific concerns might be. *Id.* at p. 4. The record does not reflect that the Bureau ever acknowledged or answered Brown's May 17, 1994, letter.

28. The Bureau responded to Brown's April 7, 1994, letters (*i.e.*, WTB Exs. 2&3) on May 20, 1994, WTB Ex. 6.[6] The Bureau concluded that Brown's April 7 letter "is inadequate, evasive, and contrived to avoid full and candid disclosure to the Commission." The Bureau went on to call it "a studied effort to avoid producing any information." WTB Ex. 6 at p. 1. The Bureau stated that "[w]ith respect to Kay's request that information provided to the Commission in response to our inquiry be withheld from public inspection, we will not make those materials which are specifically listed under the provisions of [the Commission regulations implementing the Freedom of Information Act] routinely available for public inspection." *Id.* Kay viewed this not so much as a grant of confidentiality, but rather as the Bureau simply quoting the FOIA rules. Tr. 926.

29. Kay's confidentiality concerns did not arise in a vacuum. Shortly after Kay received the Section 308(b) letter, he became aware that his competitors had a copy of it and were showing it around the Los Angeles mobile radio community. Tr. 2498-2499. As the result of some FOIA litigation against the Commission, in the fall of 1994, Kay learned that the Bureau had, in fact, contemporaneously sent

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6. The May 20 letter stated that it was responding to an April 8, 1994, letter, but it is clear from the context that it was in response to both the April 7 substantive response (WTB Ex. 3) and the April 7 request for confidentiality (WTB Ex. 2).

blind carbon copies of the Section 308(b) letter to at least six different individuals who were competitors, customers, and/or potential customers of Kay. Tr. 2497-2498; Kay Ex. 62.

30. Knowing that his competitors were already using the letter against him, and that they would certainly attempt to get their hands on any information Kay produced in response to it, Kay had asked that his response not be made available for public inspection. When the Bureau refused this request, Kay's attorneys then indicated that the responses would be copyrighted, and even placed a copyright notice across the bottom of their substantive communications with the Bureau on the subject. At that point the Bureau demanded 50 copies of the materials to be produced. Tr. 2344-2345.

31. Competitive considerations were not the only basis for Kay's confidentiality concerns. In addition to seeking the identity and contacts for Kay's customers, the Bureau was also seeking information regarding the configuration of the customers' systems. Kay believed he had a duty to his customers, over and beyond his own self-interest, to hold such information in the strictest confidence. He testified as follows:

> The release of that information to the public would not only adversely affect my company, but my customers, as well. It is — radio shops just do not release the system configuration of their customers' radio systems to the public. It's like releasing private citizens' cellular telephone numbers. It's just simply not done.

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> The consequences to my company would be direct and economic. It would probably ruin my company. My customers expect me to maintain confidentiality of their records and their system configurations. I can't just release customers' information to the public. Can you imagine the liability of releasing an armored transport company's frequency codes to the public? All it takes is one robbery where the bad guys know the frequency information and there's big trouble
>
> The same goes with alarm response companies and armed guard companies. We just cannot release that information to the public under any circumstances. To do so would endanger lives and property of my customers, their employees, and the liability to my company would be incredible.

Tr. 2342-2343.

32. In April 1994, before Kay's response to the 308(b) Request was due, an event occurred which increased Kay's suspicions and apprehension that the Bureau staff was acting in bad faith. At the time of the 308(b) Request, Kay had pending before the Commission a request pursuant to the Commission's "finder's preference" program in which he was seeking a dispositive preference for a frequency that had been abandoned by another licensee, Thompson Tree Service. The purpose of the finder's preference program was to promote efficient spectrum utilization by encouraging licensees to locate unused authorizations. Such "finders" were rewarded with dispositive preferences allowing them to apply for the

abandoned channel without being subject to competing challenges. Tr. 2345-2346.

33. Kay had previously written to the Bureau explaining that the Thompson Tree facility had been abandoned, and informally asking that the authorization be canceled in FCC's rules. He later filed the formal finder's preference request when the Bureau did not act on his informal request. In response to Bureau inquiries, Thompson Tree admitted that it had stopped using the station more than two years earlier, but expressed a desire to nonetheless retain the license in order to preserve the investment they had in the station. Kay thereupon contacted Gail Thompson of Thompson Tree and reached an accommodation with her whereby Thompson Tree would acquiesce in the cancellation of its license and Kay would provide it with repeater service so they would not lose their investment in their radio system. Tr. 2347.

34. About a week to ten days later, Gail Thompson called Kay to report that she had just received an unsolicited telephone call from Anne Marie Wypijewski, the Bureau staff person handling Kay's finder's preference request. Wypijewski advised her that the Bureau had no choice but to cancel the Thompson Tree authorization and would be doing so shortly, but that Thompson Tree could immediately reapply for the authorization. Wypijewski did not formally advise Kay of the denial of his finder's preference request until about a week after Wypijewski's telephone call to Gail Thompson. Tr. 2347, 2547.

35. Kay viewed Wypijewski's actions as a blatantly improper maneuver which destroyed any confidence he might

otherwise have had that information he provided to the Bureau would be held in confidence or that the Bureau was acting in good faith. As he explained:

> This was equivalent to a judge - because Anne Marie is decision-making staff acting, in fact, as a judge, weighing our finder's preference, releasing what she's going to do, how she's going to rule, before she releases the ruling, to tell Mrs. Thompson how to beat the effect of the ruling, to literally take from me that which I had reported in good faith to the Commission and had filed as a finder's preference. It was, to me, a direct stab at me to take away that which I had worked for, that I had in accordance with the rules, properly filed and was, in fact, an invalid license. She was taking away from me that which I had worked for and was doing it without notifying me.
>
> I was thoroughly of the opinion it was highly improper if not what they call *ex parte* representation made. This wasn't Mrs. Thompson calling in to check on something. This was Anne Marie going out of her way to tell Mrs. Thompson how to beat James Kay on a perfectly legitimate finder's preference and a perfectly legitimate report that Mrs. Thompson's license is canceled automatically. It was a way of sticking me and to help Mrs. Thompson and it just plain was wrong....
>
> I can't trust the Commission to play by the rules and maintain confidentiality, but going out of their

way to make telephone calls to tip people off how to beat me, with pre-release of decision material, how can I trust them?

Tr. 234-2350.

36. Apart from the communications by Wypijewski, Kay viewed the denial of his finder's preference request in and of itself as yet a further indication of the Bureau's bad faith. The Bureau denied the request on the stated ground that the station was already the subject of an investigation at the time it was filed. Tr. 2526. Kay was knowledgeable of the finder's preference procedures, having filed between eight and fifteen such requests during his career. Tr. 2547. He understood that the policy of denying a finder's preference request on the basis of an existing investigation is intended to prevent a licensee from taking advantage of investigatory and enforcement work already undertaken by the Commission. In other words, the rationale of the finder's preference program is to encourage licensees to seek out fallow channels and then reward them for their efforts—not to allow them to simply piggy back on somebody else's work. Tr. 2548-2549. But in this case the ostensible "existing investigation" was nothing more than the informal letter Kay himself had previously filed calling the matter to the Commission's intention. Tr. 2525, 2549-2550. Kay had never heard of a finder's preference being denied on the sole ground that the party requesting the preference had already informally brought the matter to the Commission's attention prior to formally submitting the request. In Kay's words: "It was unique. I think to this day it remains unique." Tr. 2550-2551.

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37. Brown confronted the Bureau a second time regarding the request for 50 copies. In a letter dated May 26, 1994, Brown again asserted that the "request that [Kay] submit 50 copies . . . clearly indicates [an] intent to disclose information to a substantial number of members of the public, even though Kay has not received notice . . . that any person had requested the information." WTB Ex. 9 at pp. 2-3. Brown went on to explain that Kay was asked to provide the names, addresses, phone numbers, and contacts of his business customers, in addition to the operating particulars of their accounts. Brown expressly advised the Bureau that "Kay has no confidence that the Commission would not disclose such crucial information to other persons, whether routinely or non-routinely." Brown expressly and specifically asked for comment and clarification as to this point. *Id.* at p. 3. The next day, on May 27, 1994, the Bureau, wrote a response to Brown. WTB Ex. 10. While addressing various other points raised in Brown's May 26 letter, the Bureau neither acknowledged nor answered Brown's pointed and explicit expression of concern and request for clarification as to the demand for 50 copies of Kay's responsive materials. *Id.*

Efforts to Clarify and Narrow the Scope of the 308(b) Request

38. Brown again wrote to the Bureau on May 25, 1994, this time seeking clarification of the 308(b) Request. WTB Ex. 7. Brown wrote:

> In your letter dated May 20, 1994 . . . , you indicated the Commission would be willing to clarify its request. . . . Your letter to Mr. Kay dated January 31, 1994, had not indicated that any

> clarification might either be required or provided. However, your letter dated May 20 indicates that clarification might be possible. Accordingly, we respectfully request clarification of certain portions of the Commission's request.

Id. at p. 1.

39. Brown first sought clarification as to which specific facilities were the subject of the Bureau's concern. The 308(b) Request, he reasoned, stated that it was prompted by complaints—the details of which the Bureau had thus far refused to disclose to Kay—that must reference specific facilities and particular alleged violations. "However, rather than requesting information concerning those facilities about which it had reportedly received complaints, the Commission has requested essentially all of the information which Mr. Kay might have concerning all of the stations which he operates." *Id.* Thus, Brown asked that the Bureau clarify the 308(b) Request "such that it specif[y] the facilities about which complaints are being held and such that it request[] information only about the specific stations and only such information as would allow the Commission to ascertain the veracity of the complaints." *Id.* at pp. 1-2. Brown explained that the clarification would "allow Mr. Kay to confront directly the exact accusations which have reportedly been made against him." *Id.* at p. 2.[7]

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7. Brown also specifically asked that the Bureau examine the complaints it had received to determine whether the complainants had made out a prima facie case, taking into consideration the credibility and bias of the complainants. *Id.* at p. 2.

40. On the next day, May 26, 1994, the Bureau issued a terse letter summarily rejecting the request for clarification, stating:

> The Commission's request asks for basic information that Mr. Kay would have readily available if he is indeed providing communication services to customers. In fact, such information would be a necessity in order to even issue monthly bills to users of the many systems for which he is apparently licensed.

WTB Ex. 8 at p. 1. Confronted with this refusal to disclose the particular substance of the alleged complaints against Kay, Brown immediately wrote to the Bureau on May 26, 1998, seeking more specific clarification of each of the items contained in the 308(b) Request and asking that the Bureau reconsider its May 26 letter. WTB Ex 9. The Bureau similarly rejected this request in a letter dated May 27, 1994. WTB Ex. 10.

The Substantive Response to the 308(b) Request

41. The 308(b) Request, dated January 31, 1994, initially called for a response within 60 days, *i.e.*, by Friday, April 1, 1994. WTB Ex. 1 at p. 2. By letter dated March 1, 1994, the Bureau had extended the deadline thirteen days to April 14, 1994. WTB Ex.. WTB Ex. 349 at p. 2. On May 20, 1994, the Bureau effectively extended the response date to June 3, 1994. WTB Ex. 6 at pp. 1&3. Brown repeatedly thereafter sought a further extension of the deadline, citing among other things pending FOIA litigation in which Kay was attempting

to secure production of the alleged complaints against him, WTB Exs. 7&9, but the Bureau consistently refused to extend the response date beyond June 3, 1994, WTB Exs. 8 & 10.

42. On June 2 1994, Brown submitted a substantive response to the 308(b) Request. WTB Ex. 11. It was accompanied by a declaration in which Kay verified the accuracy of the factual assertions contained in the letter. WTB Ex. 11 at p. 7. Kay testified: "I could only certify to the factual information that would be within the scope of my knowledge . . . contained in there, and I would have not have signed the declaration if I detected any errors." Tr. 932. Brown's June 2 letter first explained that Kay had an interest in two closely held corporations, Buddy Corp. and Oat Trunking Group, Inc., and that Kay "does not operate any station of which either he or the two above named corporations is not the licensee." *Id.* at p. 1. The letter further explained that Kay did not hold any license which the Commission would not already have in its own record. *Id.* at p. 2.

43. Brown renewed his various legal objections to the Bureau's request for information regarding Kay's U.S. Forest Service permits, including relevancy and the Bureau's refusal to disclose the particulars of the alleged complaints against Kay. *Id.* at pp. 2-3 & 4. Regarding the request that Kay provide the Bureau with the original grant date and the construction completion date of each of his licenses, Brown responded that there is no requirement that Kay maintain records of license grant dates, that the Commission already had the license grant dates in its own records, and, to the extent Commission rules required Kay to report construction completion dates, he had already done so at the appropriate times. *Id.* at pp. 3-4.

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44. In response to the Bureau's request for Kay's loading numbers, technical configurations, *etc.*, Brown clarified that Kay's combined systems served a grand total of 7,000 units, *Id.* at p. 4, but he asserted that providing specific loading information as of January 31, 1994 (as the Bureau had requested) could not possibly provide information that would prove or disprove any complaint the Bureau may have received, because the systems are in continual churn with customers being added and deleted all the time. *Id.* at p. 5. Brown further noted that the loading was not a factor as to any of the specific pending applications which the Bureau was claiming could not be processed absent a response to the 308(b) Request. *Id.* at p. 5.

45. Brown once again noted the exacerbation of Kay's confidentiality concerns by the Bureau's unexplained request for 50 copies of his response:

> The Commission's . . . demand that Mr. Kay supply . . . 50 copies . . . calls into serious doubt for Mr. Kay the Commission's intent to honor his request for confidentiality. Because the confidentiality of the information which the Commission has requested concerning the identity of Mr. Kay's customers is crucial to his business, Mr. Kay respectfully submits that his declining to submit such information to an agency which refuses to promise to keep such information confidential is entirely reasonable, and that in the absence of such a promise . . . the Commission's request for such information is not a reasonable exercise of its authority.

Id. at p. 6. Brown submitted only the number of copies of his June 2, 1994, letter required by Section 1.51 of the Commission's Rules. *Id.* at p. 7. He also included the copyright notice across the bottom of each page.

46. Brown asserted the following extensive legal objection to the Section 308(b) Request:

> To date, the Commission has refused to disclose to Mr. Kay the complaints on which it reportedly based [the 30(b) Request], and has refused to postpone the date for him to respond to the Commission's request until such time as the courts can determine, in currently pending [FOIA] litigation, his right to have disclosure of the complaints on which the Commission's request was reportedly based. Mr. Kay is aware that the Commission has, from time to time, received allegations that Mr. Kay had engaged in serious criminal activity. Not only has the Commission refused to allow Mr. Kay to inspect the complaints which reportedly formed the basis for its request, but the Commission has refused to provide Mr. Kay with immunity from criminal prosecution based on the information which it has requested. The Commission has threatened to impose sanctions on Mr. Kay for failing to comply with the Commission's request for information, including an express intent to sanction him by subjecting him to the cost and loss of time involved in undergoing a hearing before the Commission. With the Commission in the posture

> of refusing to disclose to Mr. Kay the alleged facts of the complaints which reportedly formed the stated basis for the Commission's request, refusing him a reasonable opportunity to ascertain the specific facts of the reported complaints, refusing to permit him an opportunity to confront his accusers and their accusations, and refusing to provide Mr. Kay with immunity from criminal prosecution, all the while threatening to impose sanctions on Mr. Kay, including the intended abuse of the Commission's hearing process, itself, as a sanction, Mr. Kay respectfully submits that the [308(b) Request] is entirely unjustified and unreasonable, and constitutes a violation of Mr. Kay's right to due process of law, as well as a violation of other rights to which Mr. Kay is entitled under the United States Constitution.

Id. at p. 6.

47. The Bureau sent Brown a responsive letter on June 10, 1994, WTB Ex. 12. The Bureau labeled the response "woefully inadequate" and threatened that it "places Mr. Kay in jeopardy of Commission sanctions which include revocation of licenses, monetary forfeiture, or both." *Id.* Having heretofore ignored each of Brown's previous objections to the demand for 50 copies, the Bureau now for the first time, in the June 10 letter, modified that "information submitted will be kept confidential . . . and only 1 original and 1 copy of the information need be filed." *Id.* The Bureau apparently considered that as "[h]aving removed the basis for Mr. Kay's objections," *id.*, but it did not otherwise

substantively address or respond to any of the extensive legal objections put forth in Brown's June 2 letter. The Bureau simply demanded the submission of the information by July 1, 1994, *id.*, and further "warn[ed] . . . that your continued posture in this matter places all of Mr. Kay's licenses in jeopardy of revocation." *Id.* at p. 2.

48. On June 17, 1994, Brown wrote to the Bureau to advise it of a Federal District Court ruling earlier that day whereby the Commission had been directed to provide Kay with a "Vaughn Index"[8] of documents that were being withheld notwithstanding Kay's FOIA requests. WTB Ex. 13. Brown explained that "[t]o date, the Commission has not disclosed to Mr. Kay the complaint(s) which reportedly formed the basis for its" 308(b) Request. *Id.* at p. 2. Brown asked for an extension of time to respond to the Bureau's January 31, 1994 letter (WTB Ex. 12) until after final resolution of the FOIA litigation. He reasoned that this would "give Mr. Kay a fair opportunity to be informed as to the factual basis, if any, of the [complaints] before the Commission demands that he attempt to submit information responsive to those complaints." *Id.* at p. 2.

49. On June 22, 1994, the Bureau responded to Brown and denied the request for extension. WTB Ex. 14. The Bureau interpreted "the numerous requests for extension of time, copyright notices and [FOIA] requests . . . [as] dilatory tactics meant to discourage the Commission from carrying out its statutory responsibility in this matter." *Id.* at p. 1. The Bureau repeated the threat that Kay's "continued posture in

8. See *Vaughn v, Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).

this matter places all of its licenses in jeopardy of revocation." *Id.* at p. 2. On June 30, 1994, Brown responded. WTB Ex. 15. As to each of the specific items in the 308(b) Request, Brown referred the Bureau to earlier responses filed on behalf of Kay. *Id.* at pp. 1-2. Brown renewed, clarified, and expanded his legal objection on the ground that the specifics of the alleged complaints had not been disclosed to Kay. *Id.* at pp. 203. Mr. Kay understood that, as of June 30, 1994, he was continuing to refuse to provide the Bureau with some of the information sought in the 308(b) Request, but he indicated that this was because his "attorneys took legal positions in answer to [the 308(b) Request] which are clearly elaborated upon in a series of letters to the Commission." Tr. 1035.

The Northridge Earthquake

50. The Northridge earthquake occurred on January 17, 1994, at 4:31 AM, Pacific Standard Time. Tr. 1416, 1684, 2206, 2270-2271, 2283. This was less than two weeks prior to the Bureau's 308(b) Request.

51. The epicenter of the Northridge earthquake was only 3.5 miles from Kay's business offices and shop in the Van Nuys section of Los Angeles. WTB Ex. 17 at p. 3; Tr. 2211. The earthquake did substantial damage to Kay's business. Randolph French, a bench technician who has worked for Southland for nearly seven years, described the damage as follows: "Well, ceiling tiles broken down, light fixtures from the ceiling falling, steel shelving units dominoed over. Computers smashed, all kinds of parts inventory was, had fallen all over the place." Tr. 2272 (emphasis added).

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52. Anthony Marshall, who has been a Southland employee continuously for the past 14 years and on and off for four years prior to that, Tr. 2307, was one of the first of Kay's employees to arrive at Southland shortly after the earthquake on the morning of January 17, 1994. Tr. 2311. Here is how he described what he found upon his arrival.

> Jim was there already, and the place was demolished. . . . Nothing is where it would have normally have been. The dropped ceiling tiles, the light fixtures on the dropped ceiling, anything at the ceiling levels was on the ground. All the office cubicles were basically busted apart and all over the place. The desks were — anything that was on top of a desk was on the ground. Computers, typewriters, everything was a complete shambles and a mess. It looked like a tornado had literally gone through the inside of the building.

Tr. 2311-2312.

53. Deborah Kay Marshall (Anthony Marshall's spouse, Tr. 2307), also a Southland employee for the past 14 years, described the damage as follows:

> Everything. Cubicles were smashed and caved in on top of one another, on top of computer systems or telephones. Our stock room had shelves, racks that we had built in there, where the radios were all kept. They were all caved in on top of one another. We couldn't even enter that room. The sales floor, where we kept all the radios in

> showcases, the showcases were all smashed and broken and radios were pretty much on the ground, with everything on top of them. When we went back into the Tech Rooms, we found the same thing. The tech benches were all knocked over, the equipment all knocked over. Things were broken I mean, it was a disaster. We even looked at cracks in the walls, cracks in the floor.

Tr. 2283-2284.

54. Kay himself gave the following picture of the damage:

> Basically, the buildings looked liked they'd been picked up, shaken violently up and down and sideways, and then placed back down. Nothing was where it belonged. Bookcases fell over. The floors were strewn with books and papers. My desk collapsed, spewing hundreds of files all over the floor. Credenzas collapsed, spewing files everywhere. The primary computer was damaged at my shop. Water pipes, the water heaters were fractured, spewing water all over everything. Electricity was out. Basically, the place was a disaster. Huge racks that we had radios on in our storage room had teepeed. They'd fallen over, dumping all their contents on the floor, till there was nothing but a pile of radios three feet tall. Some areas were almost impossible to get into, because doors were blocked. You had to use alternative routes to even get in the various parts

> of the shop. It was basically like a horde of vandals had descended for a number of hours, with the intent of doing nothing but wrecking the place.

Tr. 2340-2341.

55. Kay's personal residence was also damaged in the earthquake and was in total disarray. Tr. 2340, 2516. The damage to Kay's residence currently stands at about $150,000 to $200,000 and is still climbing. To this day he is still doing repairs and still finding damage. Tr. 2516-2517. Kay obtained SBA Disaster Loan Assistance, both personally and for his business, which reimbursed only a fraction of the total damages he incurred. Kay Ex. 11.

The Effect of the Earthquake on Kay's State of Mind

56. Jeffrey L. Cohen is a California attorney who began doing legal work for Kay in about 1991. Tr. 2204-2205. During 1992, Cohen communicated with Kay on a weekly basis. Tr. 2205-2206. During 1993, Cohen communicated with Kay at least three times a week and, during the later part of the year, almost on a daily basis. In addition to telephone conversations, Cohen also frequently met with Kay approximately once every two weeks during the first three quarters of 1993, and then about twice a week during the fourth quarter of 1993. Tr. 2206.

57. Cohen testified that there was a remarkable change in Kay's demeanor and personality as well as in his professional and personal habits after the Northridge earthquake. According to Cohen, prior to the earthquake:

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> [Kay] was a fairly easy client to work with. He was very focused on his business. He understood general basic legal issues. In my dealings with him, basically he would consult with me regarding sometimes general business problems, also the litigation I was representing him with. He would talk about general options and other matters dealing with that, and he would basically listen to what was being presented, discuss the options, and then make the decision based on those matters. He was attentive, demanding, but basically fair to deal with.

Tr. 2207-2208. Kay was almost always responsive to Cohen's requests. Tr. 2208. After the earthquake, however, he changed quite a bit both physically and emotionally. Cohen noticed that Kay did not look healthy, that his skin pallor was different, that he appeared not to be sleeping well, and that his eating habits became atrocious. Tr. 2208. Kay also seemed not to be attending to his personal appearance. Cohen noted that he was not getting his hair cut as often and that he often wore the same clothes and they were much more rumpled. Tr. 2209-2210.

58. Cohen further explained the change in Kay as follows:

> His ability to focus on matters was changed considerably. Prior to that time, we had almost established a pattern of how we dealt with any type of legal issue or problem that arose and basically what I would do is give him my view of

> what we thought was the legal issue and what I thought his goal was, and then I'd give him the various options and we'd discuss the ramifications.

Tr. 2208-2209. Cohen also participated in some conference calls during 1994 with Kay and Brown & Schwaninger, Kay's Washington, D.C. communications attorneys at the time. During these calls, Cohen observed that Kay "was having difficulty understanding the legal ramifications of what was occurring." Tr. 2216. Cohen attributed this to Kay's inability to stay focused. *Id.*

59. Cohen believed that Kay was depressed as a result of the devastation to his business from the earthquake. Tr. 2210. This opinion was based not solely on his familiarity with Kay, but also on his own personal understanding of the earthquake as a Los Angeles resident who lived through it and was affected by it. Tr. 2207. As Cohen observed, "people who weren't there don't understand the devastation to business that occurred." Tr. 2210. Cohen's law firm continued to represent Kay for approximately two more years after the Northridge earthquake. During this period, he observed a gradual recovery and improvement in Kay's business acumen and ability to concentrate. As Cohen put it: "The farther he got away from the earthquake, the better he was." Tr. 2212. But up until the time Cohen's firm stopped representing Kay, in late 1995 or early 1996, Kay "was never back to what he was prior to the earthquake." *Id.*

60. Cohen's impressions were corroborated by those who worked with Kay. Randolph Scott French has worked

as a bench technician for Southland Communications since May 1992, *i.e.*, for nearly seven years. Tr. 2270. In the course of his duties, French had contact with Kay several times a week. Tr. 2275. He found Kay to be more irritable after the earthquake. Tr. 2276. Deborah Marshall, who has known and worked with Kay on a daily basis for 14 years, testified that Kay was much more impatient after the earthquake and seemed preoccupied. Tr. 2294-2295. Anthony Marshall, who has also known and worked closely with Kay for some 14 years, characterized Kay's behavior after the earthquake as follows:

> He was very short and quick to temper on the exact same items that before he would have very patiently explained it to you in detail. Where, after the earthquake, it was like, I don't have time to deal with this. I've got other things on my mind. You know your job, do it and get it done.

Tr. 2313-2314.

Kay's Computer System

61. Kay acquired a computer system in approximately 1988 to 1989 that was based on the Xenix operating system, a system similar to Unix. Tr. 1037. Craig Sobel, who has both computer and accounting expertise, Tr. 1390-1391, has provided consulting services to Kay for the past ten years. Tr. 1392. Craig Sobel had no role in maintaining Kay's Xenix computer system. His duties were limited to programs he wrote for Kay to run on the Xenix system. Tr. 1397. He does, however, maintain Kay's DOS-based system which later

replaced the Xenix system. Tr. 1398. Sobel developed a custom billing program for the Xenix system. Tr. 1394-1395. The billing software was designed to cover the repeater services provided by Lucky's; it did not cover Southland's equipment and service operations. Tr. 1395. Craig Sobel made many changes and modifications over the custom billing package over the years. Tr. 1037-1038, 1395.

62. The user interface for the custom billing package designed by Craig Sobel was the "customer maintenance screen". Tr. 1399. Kay's staff used these screens to enter and modify customer data, and they could also bring up and view these screens on a computer monitor. Tr. 1036. The billing software package was never intended as a means of maintaining system loading records for licensing purposes. The primary purpose of the program was to generate customer bills. Tr. 1038. The program was modified in 1992 to allow inclusion of information regarding the number of mobiles a customer might have at a given site. Tr. 1395. Information on the number of mobiles was included primarily as a convenience to Kay and his staff, but it was not audited and was not necessarily accurate or up to date. *Id.* The program design parameters did not require that the number of mobiles even be entered into a customer maintenance screen. Tr. 1422, 1432-1433.

63. Kay was using this Xenix-based custom billing program in January 1994. Tr. 1038. The Xenix system was damaged in the Northridge Earthquake, resulting in frequent crashes and the eventual failure of the system. Tr. 1038, 1416. The Xenix system was replaced in approximately April 1994 with a DOS-based computer system. Tr. 1039. Craig Sobel

was retained to convert the billing system from the Xenix to the DOS system. Tr. 1417. During the process of converting from the Xenix to the DOS system, Craig Sobel discovered that several files had corrupt data and had to be removed. There was no hope of reconstructing the corrupted files. Tr. 1418. The damaged files were removed entirely from the database file, and it would also have been necessary to remove all records dating prior to the date of the damaged records in order to preserve the accounting integrity of the billing program, *i.e.*, to keep it "in balance". Tr. 1428-1431. Craig Sobel testified that the corruption could have resulted from damage to the data files caused by a power shut down or a hardware failure. tr. 1449. There were power outages at Kay's shop for weeks and months following the January 17, 1994, Northridge earthquake. Tr. 1684, 1688, 2344. Kay and his staff salvaged what data they could from the Xenix system, transferred it to the DOS system, and then set about the task of re-entering the lost data manually from information contained in paper files. It took Kay's staff at least two to three months to re-enter the customer data into the DOS system. Tr. 1039-1040, 1682-1683, 2285.

64. During discovery, Kay produced copies of each customer print screen available in his system as of March 1995, totaling more than 850 pages. WTB Ex. 347. Craig Sobel was retained to modify Kay's system to make it possible to print the screens and to assist Kay's staff in responding to the Bureau's discovery requests. Tr. 1036, 1399. Prior to Craig Sobel's modifications, in order to have generated WTB Ex. No. 347, Kay's staff would have been required to bring up each screen, one at a time, hit the "print screen" button on the terminal keyboard, then walk over to

the printer and hit the form feed, and repeat this process more than 800 times. Tr. 1400. This manual procedure would not have been possible, however, under the Xenix system used by Kay prior to April 1994. Tr. 1403. In a good faith effort to comply with discovery demands, Kay had Craig Sobel write a program in March 1995 that could be executed on the DOS system to run this process automatically, and that is how WTB Ex. 347 was generated. Tr. 1400-1401.

65. In November 1995 Kay supplemented his discovery responses by providing the Bureau with so-called "Loading Reports." WTB Ex. 19. WTB Ex. 19 was generated in response to Bureau Interrogatory No. 4 which requested: "With respect to each of the call signs listed in Appendix A [of the HDO], identify each and every 'end-user' (*i.e.*, customer) and the number of mobile units of each 'end-user' (*i.e.*, customer) since January 1, 1991." WTB Ex. 19 at p. 1. Providing information entirely responsive to this request was problematic because, as previously explained, (a) Kay neither maintained nor organized his billing records by call sign, and (b) Kay's billing system was not designed to maintain historical tracking of outdated customer configurations.

66. Kay once again enlisted the assistance of Craig Sobel to prepare the supplemental response that is set forth in WTB Ex. 19. In order to generate this report Kay used a "loading report" feature built into the billing software. Craig Sobel was not sure when this capability was added to the program and did not know whether it was available in the Xenix system that had been in use prior to April 1994. Tr. 1412, 1416. The loading report capability did exist, however, on the DOS system as of November 1995, but it only generated

current customer information. Craig Sobel assisted Kay's staff in generating and printing loading reports that included, to the extent possible, historical data. Tr. 1411-1412. Mr. Sobel explained the procedure as follows:

> There was quite a number of customers on Mr. Kay's datafile, customer datafile that had been deleted over the years. . . . We had to remove the delete flag from each of these records, store the fact that they were deleted someplace else, calculate these reports, and then redelete them when we were all done.

Tr. 1412.[9] Craig Sobel also facilitated the printing of the reports by creating a routine that allowed the reports to be calculated and printed as a batch, rather than requiring Kay's staff to generate the reports one-by-one sequentially typing in each frequency and site. Tr. 1413[10]

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9. Normally, when a record is deleted from the database, it is not actually removed, but rather a flag is set indicating to the program that the record has been marked for deletion. The record remains, however, until affirmative steps are taken to permanently remove it, but data in "deleted" records would not be included in any loading reports. Tr. 1428-1429.

10. It was not necessary to un-suppress deleted records to generate the customer maintenance screens produced in March 1995 (WTB Ex. 347). It was still possible to view (and hence print) a customer maintenance screen after the record had been deleted, however, the data from the deleted record would not, absent the modification, be included in a loading report. Tr. 1436. Accordingly, both WTB Ex. 19 and WTB Ex. 347 represent essentially the same universe of data, but at two different points in time, WTB Ex. 347 being as of March 1995, and WTB Ex. 19 being as of November 1995.

67. Even with all of these modifications to his system in an effort to respond to the Bureau's discovery request, it was still not possible for Kay to provide a complete and accurate account of historical loading. In the custom billing package designed by Craig Sobel and used by Kay, when data was changed in a particular field, the old data was gone. For example, if a customer record were modified to indicate a change from one frequency to another, or reflect an increase or decrease in the number of mobiles, the old information would be overwritten with the new information and the system would maintain no record of the change. Tr. 1433. Kay did not specifically ask that the billing system be designed in this way. It is simply the way Craig Sobel designed it, and he had seen other systems designed in this manner. Tr. 1437. Accordingly, while WTB Ex. 19 included existing and deleted accounts dating back to September 1993, it included those accounts only in their most recent configuration in the database. Any previous information was no longer reflected. Tr. 1433-1435.

68. James P. Hanno, who testified as an expert witness, has over twenty years experience in the land mobile industry as a licensee, an equipment vendor, and as a consultant. Kay Ex. 63 at ¶¶ 1-4. Hanno examined Kay's billing system and opined as follows:

> It is not possible, using Mr. Kay's billing system, to reconstruct a "snapshot" of system loading for a particular past date. There are at least two reasons for this. First, the system is not designed primarily for system maintenance and loading, but rather for billing. Second, each time a customer

> record is edited (*e.g.*, when a customer adds or decreases units, modifies service options, etc.) the old information is overwritten and thus lost. In this regard, Mr. Kay's custom system is typical of the off-the-shelf software packages designed for small SMR operators.

Id. at ¶ 8.

69. In Kay's normal business practice, he did not maintain and organize his records by call sign. Tr. 987. James Hanno observed:

> Mr. Kay stores customer information in his billing system by frequency and repeater location rather than by call sign. In my experience, this is not uncommon in the SMR industry, particularly when there are multiple sites covered by a given call sign, multiple call signs at a particular repeater site, and sometimes even multiple calls signs for a single repeater. It is much simpler and more meaningful to the operator to keep the information by site location and frequency.

Id. at ¶ 9. After Kay's staff, with Craig Sobel's assistance, had generated the November 1995, "loading report," Kay went through it and cross-referenced the repeater locations and frequencies against his paper records and manually wrote the corresponding call signs on each sheet. Tr. 986. This process required Kay to manually parse through the records for more than 150 call signs in order to comply with the Bureau's request. Tr. 987, 1160-1161.

70. In producing the November 1995 leading report, Kay expressly qualified it as follows:

> These reports are generated as of November 9, 1995, and represent each customer's current repeater system configuration. . . . No customer who discontinued service prior to September 1993 is included, and prior usage by customers of other frequencies, addition of sites, deletion of sites, additions of frequencies, deletion of frequencies, increases in mobiles, decreases in mobiles, and changes in frequency from prior system configurations are not reflected in the attached Loading Reports.
>
> Note: records were not kept "by call sign." Information is kept by repeater customer name in current configuration only. Also, Kay's records do not reflect Kay's own shop use, nor records of other users in other shops who used radios at no charge, and these records do not include rentals, demos and loaners, because none of these records resulted in customer billing for repeater services, even though use of the repeaters did occur.

WTB Ex. 19 at pp. 1-2.

71. The data in Kay's computerized billing system is stored in files known as "DBF" files, *i.e.*, in a standard database format. Tr. 1088-1089, 1420-1422. Concerns for confidentiality of customer data aside, the idea of producing the underlying DBF files from the billing system in response

to the Bureau's January 31, 1994, 308(b) Request was simply something that never occurred to Kay at the time, or even later during discovery. Kay was not intimately familiar with the internal workings of the billing system. Tr. 1088-1089. Kay had never before and has never since, produced any information to the government on magnetic media. Tr. 1044, 1095. The computer system was designed to generate customer bills, not to store and retrieve system loading data. Thus, even if Kay had been able to provide uncorrupted DBF files in January 1994, they would have been neither complete nor responsive to the 308(b) Request. The mobile loading data was maintained in the system solely for internal convenience, not as a legal record, and the data was not audited for accuracy or completeness. Tr. 1045.

72. As previously explained, the data files were generated and maintained by a billing software package custom designed for Kay. Tr. 1394-1385. Even if the Bureau had been provided with the DBF files, it would not have had the custom billing package needed to view and manipulate the files. Based on the testimony of Eric R. Johnson, a computer expert who testified at the hearing, there is reason to question the integrity and reliability of data produced by simply copying the DBF files. Although it is possible to view a DBF file generated by a custom database application in other software packages, it is not possible to insure that the integrity of the data will be maintained. This is because customer database applications are typically designed to have links whereby different data fields are interrelated and internal calculations are made. It cannot be assured that these internal links and calculations will be accurately reflected and reproduced if the DBF file is viewed with a software package other than its native application. Tr. 2046-2048.

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73. The paper records produced by Kay in March 1995 (the customer maintenance screen printouts), WTB Ex. 347, and in November 1995 (the loading reports), WTB Ex. 19, contain virtually all of the same data that would have been contained in the DBF files. These productions actually were more accurate and reliable than the DBF files. Prior to producing the customer maintenance screen printouts in March 1995, Kay and his staff went through the more than 850 records, customer-by-customer, and did their best to audit the data to make sure it was accurate by matching it against the paper files and records. Tr. 1045-1046.

74. Kay generally performed the backups of the computer system. Backups of the Xenix system did not work properly, and the data was lost when the system ultimately crashed following the Northridge earthquake. Kay had backed up the Xenix system approximately every couple weeks, using a single backup tape that was overwritten each time. Kay understands that some sort of "file-allocation" table error on the Xenix server was duplicated on the backup, resulting in data loss. Tr. 1092. The last backup of the Xenix system would have occurred in January 1994. Tr. 1094. Kay later started doing backups of the DOS system in approximately July 1994. Tr. 1080-1090. On the DOS system, he performs backups approximately once a week and uses about three backup tapes which he rotates, overwriting the oldest one first. Tr. 1089-1091. Craig Sobel developed the backup routine, and Kay understood that it first erased the old files from the backup tape and then copied the current files from the server to the tape, so that the practical effect was "overwriting" the tape. Tr. 1090-1091.

75. Kay also had a practice under the old Xenix system of periodically purging deleted accounts from the billing system. Tr. 1094. Craig Sobel explained that when files are "deleted" from the system, they actually are simply marked for deletion (*i.e.*, a delete flag is set), but are not actually purged until the database is "packed". Tr. 1428-1429. The Xenix system was last purged in approximately September 1993, and there have been no purges of the DOS system. Tr. 1094.

76. Just as it had never occurred to Kay to produce copies of the DBF files in response to Bureau requests for information, Tr. 1044, he likewise never considered producing the backup tapes in response to the 308(b) Request. Tr. 1095. When the idea was suggested to him during the hearing, however, he noted that, in addition to the fact that he had never previously provided any government agency with information in magnetic form, the backup tape cartridges would also have included a wide range of materials on his computer system (including confidential correspondence with legal counsel), and, like the DBF files themselves, would not reasonably have been responsive to the information request. Tr. 1095.

Construction and Operation Issue

77. This issue may be divided into two parts: (1) whether Kay willfully or repeatedly violated rules regarding timely construction and/or permanent discontinuance of authorized facilities, and (2) whether Kay willfully or repeatedly violated rules regarding system loading.

Appendix 1

Timely Construction and/or Permanent Discontinuance

78. Kay generally constructed facilities promptly after license grant, if not before. Tr. 959. Indeed, he had a financial incentive to do so, in that the sooner he constructed and got a station operational, the sooner he could place customers on it and start generating revenue. Tr. 2366-2367. Often repeaters were pre-constructed, in which case the construction date is the date of license grant. Tr. 959. In cases where Kay converted users' existing licenses to private carrier or SMR systems licensed to Kay, the facilities were already constructed upon grant of the conversion authorization. Tr. 900-901. Similarly, facilities associated with authorizations which Kay acquired by assignment were deemed "constructed" as of the date the assignment of license application was granted. Tr. 901. Even where application was made for a new facility, Kay often pre-constructed stations, installing all the hardware, tuning the transmitter, and arranging for it to be remotely activated upon receipt of authorization. Tr. 2366. Even when not pre-constructed, new installations were typically completed within two to three months after grant. *Id.*

79. When Kay completed construction of a new location, he jotted down the date on a slip of paper which he would stick in a file. When the 800A letter[11] arrived from the Commission he would then transfer the date and other pertinent information onto the 800A letter, mail it back to the Commission, keep a copy in the file, and discard the note. Tr. 958, 2367-2368.

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11. 800A letters are form letters that the FCC routinely mails to licenses of 800 MHz systems inquiring as to the date and particulars of station construction. Tr. 983-984.

80. Kay did not otherwise keep records specifically recording the construction completion dates of his facilities. This was due primarily to the way his systems were configured and how his business was operated. The measurements and alignment of Kay's repeaters was typically done weeks or months in advance of actual installation. Tr. 953. When equipment arrived from a vendor, it was untested, not tuned, and not assigned to a working frequency. Tr. 954. The equipment was removed from the box, aligned, tuned, power levels were set, and then set up on a test frequency. At that point it was placed on a shelf along with the other inventory and was not yet part of a particular station or call sign. Tr. 955. When a repeater was needed, one of these conditioned radios was pulled from the inventory. When a technician went to service a repeater site, he would frequently take one of the inventory repeaters with him and, if the problem was not something that could be easily repaired at the site, the malfunctioning repeater was removed, the inventory repeater was tuned to the frequency and installed, and the malfunctioning radio was returned to the shop where it could be repaired, if possible, and cycled back into the inventory. Tr. 956. As a result of this procedure, equipment was constantly being recycled, and Kay did not maintain records that associated and tracked a particular piece of equipment to a particular call sign. Tr. 956.

81. This practice regarding inventory and record keeping was reviewed by James P. Hanno, an expert witness with over twenty years experience in the land mobile industry as a licensee, an equipment vendor, and as a consultant. Kay Ex. 63 at ¶¶ 1-4. Mr. Hanno stated:

> The procedure described above is typical of most SMR operations with which I am familiar, especially

> those using modular, rack-mounted units. As practiced by Mr. Kay, the only records maintained in these instances are any purchase invoices, shipping statements, etc., associated with the purchase, delivery, and acceptance of the repeater, and possibly any work orders for specific installations or repairs. It is my understanding that Mr. Kay does not maintain detailed serial number records tracking all the changes and repairs made with respect to a specific licensed location, nor does he maintain logs at the repeater locations themselves. In my experience, fewer than half of all SMR operators maintain any more detailed records in this regard than does Mr. Kay.

Id. at ¶ 11.

82. During the course of discovery, Kay provided the Bureau with as accurate and as complete information as possible regarding the dates on which his various facilities were constructed. In those cases where the facilities were neither pre-constructed, already constructed at grant, or there was no 800A letter, Kay did his best to determine the historical construction date by reference to other records, *e.g.*, service invoices. Tr. 902. On or about May 11, 1995, Kay submitted his *Amended Responses to Wireless Telecommunications Bureau's First Set of Interrogatories*. Attachment A to that filing is a tabulation showing, *inter alia*, the license grant date and construction date for each Part 90 facility licensed to Kay. WTB Ex. 290. For purposes of this proceeding, the parties have stipulated that, as to each site annotated as "Not in operation" in the "Comments"

column of Attachment A, that site was either not timely constructed or that operation of that facility had been permanently discontinued as of May 11, 1995. Tr. 1232. The Bureau presented no evidence that any authorized facilities other than those specifically covered by this stipulation were not timely constructed or that service on each facilities has been permanently discontinued.

83. The *Wireless Telecommunications Bureau's Statement of Readiness for Hearing* was filed in this proceeding on or about June 3, 1998. Paragraph 14 of that pleading provided: "The Bureau intends to present evidence that Kay did not construct stations WPEE253, WIK726, WIK896, WIK664, WIL260, WIK983, WIH339, WIL469, WIK875, WIK287, WIK374, WNJL306, and WNXW487 by the pertinent deadlines." Kay's uncontested testimony as to each of these stations is as follows:

- *WPEE253.* Kay testified that this station was already constructed at the time the authorization was granted to him. Before it was licensed to him, Kay had been operating it as a community repeater on behalf of a customer, and it was later converted. Tr. 2363.

- *WIK276, WIK896, WIK664, WIL260, WIK983, WIL469, WIK875, WIK287, and WIK374.* Kay testified that each of these stations was timely constructed. He specifically recalled having a lease at Sierra Peak, first at the Meridian Building and later at the TLF Building, and timely installing all repeaters that were going into Sierra Peak. Tr. 2362-2365.

- *WIH339*. Kay recalled that this station was initially constructed at Mount Lukens at the time he acquired the authorization by assignment from a customer. Subsequently a location was added at Sierra Peak, and that modification was also timely constructed. Tr. 2365.

- *WNJL306*. Kay specifically recalls the timely construction of this station at Santiago Peak in January or February 1988 at the Meridian Building, in that he recalls "getting a flat tire 20 miles back in the middle of nowhere." Tr. 2365-2366.

- *WNXW487*. Kay testified that this station was timely constructed at both authorized locations, Heaps Peak and Santiago Peak, on a timely basis.

System Loading

84. Kay operated stations on a commercial basis providing repeater service to end users. He established repeaters and provided communications service to end users through those repeaters. This is akin to the provision of cellular service. Tr. 864. He offered these services through Specialized Mobile Radio (SMR) stations that operated in the 800 MHz band, and through private carrier stations that operated in the 470-512 MHz band or "UHF". Tr. 1002, 1108. Kay's UHF stations were licensed in the Business Radio Service. Tr. 960-961. In both the 800 MHz and the UHF bands, Kay also operated community repeaters for customers. Tr. 971. In these circumstances the repeater authorization was held by the customer who either owned the repeater equipment or rented it from Kay. Tr. 938.

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85. Prior to 1994, one of the items specified on an application for a private carrier UHF repeater license would have been the number of mobile units to be authorized. Tr. 974. During the period from October 1992 to some time in 1994, one of the items specified in an application for a conventional SMR 800 MHz repeater license was the number of mobile units to be authorized. Tr. 971, 975. Prior to October 1992, mobile units were not authorized as part of an SMR repeater license, and end users were separately licensed for the number of mobiles required by them. Tr. 975-976. Thus, prior to October 1992, two authorizations were effectively required to legitimize 800 MHz SMR repeater operations—the repeater authorization held by the SMR operator, and the end user license held by the user. Tr. 1890-1899. Sometimes, end user applications were submitted concurrently with the repeater application as part of a package filing; at other times, the repeater application and end user applications were submitted separately at different times. It all depended on the particular configuration and circumstances. Tr. 976.

86. The October 1992 date is significant because 800 MHz end user licensing was eliminated as of that date. In August 1992 the Commission amended its rules and regulations to eliminate separate end user licensing as to 800 MHz SMR stations. *Amendment of Part 90 of the Commission's Rules to Eliminate Separate Licensing of End Users of Specialized Mobile Radio Systems*, Report and Order, PR Docket No. 92-79, 7 FCC Rcd 5558, 71 Rad Reg. 2d (P&F) 166 (1992). The elimination of end-user licensing became effective on October 8, 1992. 57 Fed Reg. 40850 (September 8, 1992). After October 1992 the Commission no longer accepted applications for 800 MHz SMR end user licenses. Tr. 972, 1906.

87. When Kay filed applications specifying a number of mobile units, he was generally projecting anticipated loading for as much as twelve months out, *i.e.*, allowing approximately four months for the coordination and procession of the application plus the eight month construction and "in-operation" deadline applicable at the time. Tr. 976-977. In making these projections, Kay relied on his business judgment, his knowledge of the radio industry, his familiarity with his own business, anticipated sales, anticipated need for additional frequencies to meet customer expansion needs, communications with other radio dealers, conversations with his customers, *etc.* Tr. 977. He was making a "crystal ball" prediction, a forecast, a business estimate of anticipated future needs. Tr. 977-978.

88. Kay's computer-based billing system (from which the data in WTB Exs. 19 and 347 was derived) provides neither a complete nor an accurate accounting of the loading on Kay's system. Kay considers the "loading" on a system to include his own "hard paying" customers (*i.e.*, direct customers who pay Lucky's for repeater service); customers of other radio shops who obtain repeater service through Kay's facilities pursuant to special arrangements between those shops and Lucky's rental units which Southland charged for rental but which Lucky's did not charge for the repeater service; shop radios and "demo" units on hand for internal and other miscellaneous uses. Tr. 1069, 1087, 1116, 1128-1129. In short, the database reflects mobile units only for accounts for which a bill was generated to send to a customer. Tr. 1153-1154, and even then the billing system database would not accurately reflect many of these units, either currently or historically, for a number of reasons.

89. The database contained no information on any non-current customer who canceled service prior to approximately

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September 1993—the date the Xenix system was last purged. Tr. 1046, 1087-1088. For customers who are reflected in the database, only their most recent configuration is given. Changes in customer configuration (changes in repeater sites, additions or deletions of units, *etc.*) are not tracked. Tr. 1433. The database was designed solely and exclusively to facilitate billing, not to track loading; it does not accurately reflect loading. Kay often included access to multiple repeater sites as part of a customer's service package, but only billed the customer for one site. For example, a customer might be billed for access to repeaters at Mount Lukens and also given "free" access to repeaters at Sierra Peak, and only Mount Lukens would be reflected in the database. Tr. 1017-1018, 1048-1049. Prior to some time in either late 1993 or early 1994, the customer maintenance screen format did not accommodate a large number of repeater sites without the software causing other problems, and so the so-called "free" sites were not reflected. Tr. 1049, 1106-1107. But whether or not Kay specifically charged for access to a repeater site, if the customers had access to and, in fact, used the site, it was doing so pursuant to Kay's license and was, therefore, properly considered part of the loading on the system. Tr. 1075.

90. The table below shows, in each columns from left to right: (a) the call sign and primary location of each trunked SMR (YX) authorization currently held by Kay; (b) the number of base station repeater channels authorized under the call sign at the primary location;[12] (c) the number of mobiles required to satisfy the 70 mobiles per channel loading criterion;[13] and,

12. The Bureau has not presented any evidence against Kay under the loading issue as to his trunked system. Likewise, it has not urged an adverse determination under this issue.

13. The figures in this column were calculated by multiplying the number of authorized base station repeater channels by 70.

(d) the actual number of units reflected in Kay's billing records as of November 1995. As shown, Kay's trunked SMR (YX) systems were fully loaded to well over 70 mobiles per channel.

Loading on Kay's Trunked SMR (YX) Systems

Call Sign / Location	Channels	Required	Actual
WNMY402 / Mount Luken	11	1260	2687[14]
WNPJ874 / Mount Lukens	7	(combined)	(combined)
WNJA910 / Oat Mountain	17	1190	2028[15]
WNSK552 / Castro Peak	3	210	785[16]
WNJL306 / Santiago Peak	9	630	2702[17]
WNXW327 / Heaps Peak	8	560	743[18]
WNKV762 / Snow Peak	3	210	453[19]

91. Kay provided repeater service to end users on a commercial basis acting as a "private carrier" with respect to UHF stations or as an "SMR" with respect to 800 MHz stations. Unlike other Part 90 licenses, commercial service providers experience a constant fluctuation in loading.

14. WTB Ex. 19 at pp. 148-157.

15. WTB Ex. 19 at pp. 157-165.

16. WTB Ex. 19 at pp. 166-169.

17. WTB Ex. 19 at pp. 179-177.

18. WTB Ex. 19 at pp. 178-181.

19. WTB Ex. 19 at pp. 186-187.

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Customers come and go, customers increase and decrease their mobile counts and otherwise change their configuration, with the result that loading goes up and down over any particular period of time. Tr. 1002, 1116-1117, 1130-1131. Kay kept radios in inventory to be able to respond to these constant changes and fluctuations in customers demand, as well as to be used as loaners, rentals, and demos. The record reflects that Kay maintained an inventory of user radios (both UHF and 800 MHz, both conventional and trunking) from approximately 1,000 to 1,500 units before the January 1994 earthquake and about 600 to 700 units after the earthquake and now. Tr. 2273-2274, 2494-2495; Kay Ex. 48.

92. In addition to repeater service provided directly to users by Lucky's and/or radios sold or rented to users by Southland, Kay has arrangements with more than two dozen other dealers who use Lucky's repeaters for their own internal shop and memo use, to provide service to loaner and rental units and to provide service to their own customers. Tr. 2374-2377. These dealers, at any given time, have an average of 15 to 20 loaners, demos, and rentals active on Kay's repeater system but which would not be reflected in Kay's computer-based billing system. Tr. 2378-2379. Kay identified a substantial number of these dealers by name, specifically confirming his relationship with them currently and prior to January 1994. Tr. 2379-2382. The billing system and hence the data reproduced in WTB Ex. No. 19, reflects no loading on certain stations simply because the service area is overlapped by other stations, the specified facility is one licensed under multiple call signs and other similar idiosyncrasies. Tr. 1107-1113. It also did not reflect "talk-around" use, *i.e.*, units that transmit direct, mobile-to-mobile,

without going through the repeater itself, but which nonetheless operate under the auspices of the repeater authorization. Tr. 1078, 1082.

93. Most applications submitted by Kay did not require an examination of loading. Kay recalls only a few times when he was actually required to demonstrate loading on his own system. Tr. 1221. Kay explained that he had found legitimate ways to avoid the exercise because it was such a complicated task. It required looking at the entire loading situation on the channel by all licensees. If a channel were already loaded to more than the specified level by other co-channel licensees, the loading on the application that he was proposing did not matter. When Kay did have to look at the loading on his own system, he relied on the totality of his business records (computer system, paper records, *etc.* plus what he knew off the top of his head. Tr. 1221-1226. Another method used by Kay was to "package" repeater applications with the end user applications in such a manner that the question of loading on existing systems of the applicant would be irrelevant because an application "would be granted into a fully loaded environment," Tr. 976, 2342-23243. Indeed, the record contains an example of such a "package" application that was presented by Kay and granted by the Commission. WTB Ex. 311; Tr. 2347-2349.

Multiple Applications Issue

(1) *Roy Jensen*

94. Roy Jensen was employed by Southland from the Spring of 1990 to May 1992. Tr. 1463. He became general manager shortly after joining Southland. Tr. 1464. Neither Jensen nor the Southland employees he supervised had any

direct duties with regard to Lucky's. Tr. 1465. Jensen and Kay had late dinners together several times a week during which they would, in Jensen's words, "discuss business in general." Tr. 1493.

95. Jensen's "best recollection" is that Kay asked Jensen to sign an application for a land mobile license. Tr. 1484. He believes that WTB Ex. 306 is a copy of that application. Tr. 1486. It is an application for an 800 MHz end user license, FCC File No. 9008511576, seeking authority to operate 37 mobiles. WTB Ex. 306 at p. 1. The applicant is designated as Roy Jensen dba Consolidated Financial Holdings. *Id.* The application was granted by the Commission, and an end user license (Call Sign WNUG662) was issued, which Jensen received in the mail. WTB Ex. 307; Tr. 1488.

96. Jensen testified that Consolidated Financial Holdings is a business name that he registered some time ago in order to pursue business activities unrelated to his employment at Southland. He does not recall when he took out the name, but it could have been during his first year at Southland, *i.e.*, 1990. He does not recall the nature of the anticipated business project and he states that he never pursued it. Tr. 1478-1479. Jensen denies that Consolidated Financial Holdings ever operated any radios (repeaters or mobiles), Tr. 1485, and he denies that he ever told Kay he wanted to operate 37 mobiles, Tr. 1488. Jensen does acknowledge having done off-hours surveillance work, together with Southland employee Kevin Hessman, providing mobile radio communications support for the Los Angeles Police Department. Tr. 1521-1523.

97. Kay testified that he assisted Jensen in obtaining the user license so that Jensen could use shop radios outside of his employment with Southland to pursue his own business interests. Kay recalled that Jensen "was always involved in one type of would-be entrepreneurship or another. . . . He always wanted to have his hand in business in some fashion." Tr. 2520. When Jensen expressed admiration and interest in Kay's SMR activities. Kay explained that Jensen could do that as well, and he assisted Jensen in obtaining the end user license and provided Jensen with free use of shop radios to pursue Jensen's outside business activities. Tr. 2520-2521. There was no written agreement between Jensen and Kay. Tr. 1485, 2521.

98. When asked about the termination of his employment with Southland, Jensen testified that he had been "laid off" in May 1992. Tr. 1507. This was a repeat of a false statement that Jensen had previously made to another government agency. See Kay Ex. No. 1. In a ruling, dated October 7, 1992, Administrative Law Judge Polly Thomas of the Inglewood Office of Appeals of the California Unemployment Insurance Appeals Board, in Case No. ING-63549, concluded that Jensen's "testimony, that he believed after leaving his final meeting with [Kay] that he had been laid off, was not found to be credible." Kay Ex. No. 1 at p. 4. She further found that "when [Jensen] wrote on his application for [unemployment] benefits . . . that he had been laid off, *he knowingly made up false statement to the Department.*" *Id.* (emphasis added). "Apparently believing that the real reasons for his being out of work would disqualify him for unemployment benefits, *[Jensen] attempted to hide the complete circumstances of his discharge from the Department.*" *Id* at pp. 4-5 (emphasis added).

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(2) *Kevin Hessman*

99. Kevin Hessman was employed by Southland from May 1990 to October 1993. Tr. 1796-1797. He obtained the job through his friendship with Roy Jensen. Tr. 1796. He did not have any duties relating to Lucky's. Tr. 1797. He was a stock room clerk; he did shipping and receiving and was an "all around go-fer." Tr. 1797, 1292-1293.

100. Kevin Hessman claims that approximately six months after he began working for Southland, he was approached by Kay and Jensen and asked to sign some FCC application forms. Jensen allegedly told him it was to "to help Jim with the business, and everyone else did it." Tr. 1798. He does not recall Kay saying anything in this meeting; he said Jensen did most of the talking. Tr. 1798-1799.

101. WTB Ex. 208 is an 800 MHz end user license (Call Sign WNXV559) issued on July 1, 1992, in the name of Kevin Hessman dba Hessman Security, and authorizing the operation of 73 mobile units on SMRS Station WNYR747. Hessman recalls receiving this license in the mail at his mother's house where he was residing at the time. Tr. 1798. WTB Ex. 309 is an 800 MHZ end user license (Call Sign WNNE920) issued on April 29, 1992, in the name of Kevin Hessman dba Hessman Security, and authorizing the operation of 24 mobile units on SMRS Station WNXS450. Hessman also received this license in the mail. Tr. 1800-1801.

102. Hessman claims that "Hessman Security" did not exist and never operated any mobiles, yet he admits that he was "not surprised" when the licenses arrived in the mail in the name of Hessman Security. Indeed, upon reflection he recalled some sort of discussion about that and just spitballing names of what to call it. I think Hessman Security was what Roy and Jim and me just agreed on. . . . It was no big surprise when I got the licenses in that name." Tr. 1797, 1808, 1813-1814. When the licenses arrived, he took no steps to have the Commission correct the fact that they were issued in an allegedly nonexistent business name, Tr. 1809-1809, 1814. When the licenses arrived in the mail, Hessman says he asked Kay if Kay wanted them, and Kay said that he did not need them. Tr. 1802.

103. Hessman admits that he occasionally did off-hours "public safety" work using Southland rental radios. Tr. 1803. He also did off-hours volunteer work providing support communications to the Los Angeles Police Department. He recalls that this would involve approximately 40 people, two to a car, assisting with such things as drunk driving patrols. Tr. 1804-1805.

104. Kay recalls that at some point in approximately 1992, Hessman and/or Jensen approached Kay to ask if they could make use of company radios in connection with some sort of off-hours security operations. Kay agreed. They required a couple of channels to adequately cover the Los Angeles area, so Kay selected a couple of 800 MHz channels, prepared the appropriate applications for end user licenses, and had them signed by Kevin Hessman. Tr. 1295-1296. Kay's best recollection at the time is that he believed based

on what he was told that the proposed activities involved some sort of after-hours contract security work, and he thinks that he therefore wrote it up as a business use when he prepared the end user applications. The Bureau was unable to produce copies of the actual applications, however, to refresh Kay's recollection. Tr. 1296-1297. Kay did not know the details of what Hessman and Jensen were doing in this regard at the time, because he was not "in the loop." Tr. 1296. He learned only in the course of this proceeding that they apparently were doing volunteer work for the Los Angeles Police Department. Tr. 1295, 1297. Southland employees recall that Hessman and Jensen were involved together in some sort of after-hours security activity while in Kay's employ. Tr. 2293, 2297-2299, 2315-2316, and Kay also knew that Roy Jensen had been involved with security companies before coming to work for Southland. Tr. 2520.

105. Kay's understanding of the FCC regulations was that, prior to the elimination of end user licensing in October 1992, employees who wanted to use Kay's repeater system in connection with activities outside the scope of their employment with Kay would have to be separately licensed for such use. In addition to FCC licensing considerations, if an employee were going to use Kay's radio system in pursuit of an outside business activity, *e.g.*, contract security work, Kay believed they should be separately licensed as a separate business activity in consideration of potential liability problems. Tr. 1298.

106. Kay Ex. No. 7 is the ruling, dated January 21, 1994, by Administrative Law Judge J. S. Berger of the Inglewood Office of Appeals of the California Unemployment Insurance

Appeals Board, in Case No. ING-30425. When Hessman applied for unemployment benefits after being discharged from Southland employment he alleged that he had been laid off due to lack of work, that Southland was down-sizing, and that his services were no longer needed. Kay Ex. No. 7 at p. 2. In point of fact, however, he had been discharged for cause,[20] in other words, fired. *Id.*; Tr. 12193-1294. Judge Berger thus found that Hessman "willfully and knowingly made false statements to obtain benefits." Kay Ex. 7 at p. 3.

(3) *Vincent Cordaro*

107. Vincent Cordaro worked for Southland from 1991 to May 1995. Tr. 1818, 1867. He briefly held the position of service manager, and then became general manager when Roy Jensen was terminated. Tr. 1818. He had no duties with respect to Lucky's. Tr. 1820. Prior to coming to work for Southland, Cordaro had been the owner of Mobile Service Station (MRSS), a two-way mobile radio business that was purchased by Kay. Tr. 1818. Cordaro held an SMR end user license in connection with his business activities at MRSS.

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20. One of the reasons Kay decided to terminate Hessman's employment was that he discovered Hessman had assisted Roy Jensen (who was no longer employed by Kay at the time) in a plot to embarrass Kay in connection with civil litigation and possibly cause him to incur unjustified sanctions. In attempting to clarify an unrecognized deposit in a Southland bank account, Kay discovered evidence indicating that Jensen had written a check made payable to Southland, given it to Hessman who took it to work and stamped it with a Southland endorsement stamp, and then returned it to Jensen, who deposited it in a Southland account in order to make it appear that Kay was falsely accusing him of not having paid a certain sum of money. Tr. 1293-1294.

Tr. 1885. His duties with MRSS also included assisting customers in obtaining necessary FCC licenses. Tr. 1889. Kay had prepared FCC applications for Cordaro when Cordaro owned MRSS. Tr. 1275. MRSS provided radio equipment and service to its customers. It did not directly provide repeater service, but Cordaro made arrangements for MRSS customers to receive repeater service through other licensees, including Lucky's. Tr. 1818.

108. *Rasnow Peak SMR (Management Agreement).* WTB Ex. 322 is a Radio System Management and Marketing Agreement dated November 11, 1994, between Cordaro and Kay. WTB Ex. 323 is a copy of the same agreement as re-executed by the parties on December 30, 1994, to give effect to an option provision contained in the agreement. Tr. 1273-1274. The written agreement provides that Kay will manage Station WNXR890, and at the SMR repeater that was located at Rasnow Peak,[21] less than two miles from Cordaro's residence at the time. Tr. 1926. The station was managed in largely the same manner as stations Kay managed for Marc Sobel and Jerry Gales, except that Kay recalls that Cordaro made more direct personal use of his station. Tr. 1280. At the time the Rasnow Peak repeater was originally applied for, the channel in question was already loaded to 61 units by other licensees. This means that had Kay desired to apply for the license in his own name he could have easily done so—if his base station license had been accompanied by a proposal to serve a minimum of nine end user units, the

21. The Bureau did not introduce a copy of the authorization for this station, but the record reflects that it is an SMR repeater facility on 852.4875 MHz at a location known as Rasnow Peak. *E.g.*, WTB Exs. 319 & 321.

application would have been acceptable without regard to loading (or lack thereof) on any other stations licensed to Kay. Tr. 2479-2483.

109. Prior to execution of the written agreement, there was an oral understanding between Kay and Cordaro regarding Cordaro's Rasnow Peak SMR. Tr. 1274. The understanding was that Kay would supply the equipment and would market the station to the extent he could. Cordaro would have free use of mobiles on the station. Kay was to receive the first $500 or $600 (he does not remember the precise amount) of any revenues generated from his marketing of services on the station. Tr. 1276-1277.

110. Cordaro and Kay entered into an oral arrangement whereby Cordaro would obtain a license for an SMR facility located at Rasnow Peak, which was less than two miles from Cordaro's residence at the time. Tr. 1926.

111. *Rasnow Peak SMR (Assignment Application).* WTB Ex. 321 is an application for Commission consent to the assignment of the license for SMRS Station WNXR890 from Cordaro to Kay. The assignor's portion of the application (an FCC Form 1046) bears the signature of Vince Cordaro and is dated 11/21/92. WTB Ex. 321 at p. 3. It is accompanied by a notary form executed by Barbara Ashauer indicating that Vince Cordaro appeared personally before her on November 21, 1992, and executed a one page document entitled Assignment of Authorization (the same title appearing on the FCC Form 1046). *Id.* at p. 4. The assignor's portion of the application (FCC Form 574) bears the signature of James A. Kay, Jr. dated 4/24/94. *Id.* at p. 1. Kay explained

that, although the Form 1046 had been executed by Cordaro in November 1992, Kay did not file the assignment application until sometime after April 24, 1994, because if "basically got lost in the shuffle." Tr. 1290. Kay does not specifically recall advising Cordaro in April 1994 that he was filing the assignment application, but he is sure he would have done so. Tr. 1290-1291.

112. Cordaro understands that by executing an FCC Form 1046 he is assigning his rights in a Part 90 radio license to another entity. Tr. 1850. He acknowledges that his signature is on the FCC Form 1046 with respect to SMRS Station WNXR890 (WTB Ex. 321 at p. 3), but he claims the form was not completed (*i.e.*, was blank) when he executed it. Tr. 1850-1851. Cordaro claims that on one or more occasions Kay presented him with blank FCC application forms and asked Cordaro to sign them. Tr. 1851-1853. He claims to have been unaware of the assignment application until after he left Southland and it was called to his attention by Barney Peterson, another Los Angeles area SMR operator. Tr. 1854-1855. On or about April 18, 1995, the Wireless Bureau in Gettysburg, Pennsylvania received a letter, dated April 14, 1995, addressed to Terry Fishel from Cordaro which stated as follows:

> This letter is to serve as formal notification that I do not consent to the assignment of station license WNXR890 to James A. Kay, Jr. or anyone else. Although the referenced filing may include an assignment of authorization signed by me, it was filed under false pretenses.

WTB Ex. 325. Cordaro's signature is on the letter, Tr. 1855, but Cordaro does not recall writing or sending the letter. Tr. 1856.

113. Barbara Ashauer, who notarized Cordaro's signature on the FCC Form 1046 testified that she would not have notarized Cordaro's signature on a blank FCC Form 1046 because the applicable California notary rules prohibit notarizing a signature on any form that is not complete. If there are blanks that are not to be filled in for some legitimate reason, that is to be indicated by putting a line through it, filling in "N/A" to indicate "not applicable," or some similar indication. Tr. 1988-1999. She has never executed a notarization such as this one when information on the accompanying form was left blank. Tr. 1999.

114. Cordaro did not renew the authorization for the Rasnow Peak SMR facility, and the license for Station WNXR890 expired and was purged from the Commission's database. Thus, neither the license nor the management agreement is any longer effective. Tr. 1279, 1947.

115. *End User Licenses.* WTB Ex. 316 is an 800 MHz end user license (Call Sign WPBB695) issued on November 16, 1993, in the name of Vince Cordaro dba VSC Enterprises, and authorizing the operation of 64 mobiles units on SMRS Station WNXR890. Kay believes he more than likely assisted in the preparation of the application for this license on behalf of Cordaro, but he could not state for certain without reviewing the application itself which was not made available by the Bureau. Tr. 1282. Kay recognized it as an end user authorization that allowed Cordaro to operate up to 64 units and/or share use with other users on an SMR base station also licensed to Cordaro. Tr. 1282-1283. Kay recalls that the channel was already fully loaded in this area at the time. Kay does not recall how the number of 64 mobile units was

arrived at, but the number was largely irrelevant insofar as Kay recalls this channel was already fully loaded by other co-channel users at the time, and no applications for new facilities could be filed regardless of whether Cordaro was licensed for 1 unit or 500 units. Tr. 1283-1284.

116. *Santiago Peak SMR.* WTB Ex. 317 is an SMR repeater license (Call Sign WNPY680), issued September 30, 1992, in the name of Vincent S. Cordaro dba VSC Enterprises, authorizing a facilities on 851.4125 MHz at Santiago Peak, Corona (Orange) California. WTB Ex. 318 is an SMR repeater license (Call Sign WNPY680), issued May 11, 1993, in the name of Vincent S. Cordaro dba VSC Enterprises, authorizing a facility on 851.4125 MHZ at Santiago Peak, Corona (Orange) California, and up to 72 associated mobile units. WTB Ex. 317 was issued when end user licensing was still in effect and thus does not reflect any mobiles; mobiles would be separately licensed to the users on one or more end user licenses. WTB Ex. 318 was issued after October 1992, and therefore reflects authority to operate associated mobiles in addition to the repeater itself. It was not uncommon for SMR licensees to modify their base station licenses to include authority for mobile units after the elimination of end user licensing. Tr. 1286. The license address on both versions of the Santiago Peak SMR authorization (WTB Exs. 316 and 317) was Cordaro's home address at the time. Tr. 1829. Kay believes that this authorization was later assigned from Cordaro to Marc Sobel sometime after May 1993. Tr. 1286-1287.

117. *The "Vince Licenses" Note.* WTB Ex. 319 is a handwritten list of information labeled "Vince Licenses".

Cordaro requested this list from Kay in late 1992 after Cordaro had received a protest with respect to one of his facilities from Jim Doering, another SMR operator in the Los Angeles area. At Cordaro's request, Kay jotted down a list of pending applications and licenses issued in Cordaro's name. Tr. 1287-1288. The list indicates that Cordaro at the time (1) held an SMRS base station authorization for 852.4875 MHz at Rasnow Peak; (2) had a pending (recently mailed) application for an associated end user license; (3) had a pending application for a new SMRS base station on 851.4125 MHz at Santiago Peak; and (4) had a pending application for an end user license to use Kay's Santiago Peak SMR Station WNXS753 (and indicates that this is on the same frequency as Doering's SMR). WTB Ex. 19. The document also contains the notation: "Attorney - Curt Brown, Brown and Schwaninger, Atty at Law". *Id.* Kay added this information to the list because Cordaro asked who Kay used as an attorney. Tr. 1287-1288.

118. Cordaro admitted that he had in fact asked for the listing set forth in WTB Ex. 319. He initially insisted that he had done so in late 1994 in connection with entering into the written management agreement with Kay (WTB Exs. 322 & 323), Tr. 1825-1826, 1889-1890, but on cross-examination, when confronted with the dates of various authorizations and applications that are referenced in the handwritten list he equivocated. Tr. 1293-1295. WTB Ex. 319 contains two references to pending SMR end user applications, and such applications were no longer accepted by the FCC after October 1992. It also makes reference to a pending application for a "new" SMR base station at Santiago Peak on 851.4125 MHz, an application which was granted (and

hence no longer pending) in 1992, as indicated by the September 30, 1992, license issue date on the authorization for call sign WNPY680 (WTB Ex. 317). Tr. 1293-1295.

119. *Cordaro's Independent Business Activities.* Cordaro has been an entrepreneur, owning and operating MRSS, long before he came to work for Southland. Tr. 1269. It was fully understood between Cordaro and Kay that Cordaro would be free to pursue outside business interests and activities while he was employed by Southland, "as long as he wasn't banging on competition with [Kay] where he would adversely affect [Kay's] business." *Id.* Kay knew that Cordaro had a company called VSC Enterprises that was involved in a number of different activities, though he was not aware of all the details; and he also know that Cordaro together with a friend name Rudy Catania were in some sort of radio communications activities such as installing cable television systems, master antenna systems, *etc. Id.* Kay also knew that Cordaro had an office in his home. Tr. 1269-1270.

120. Shortly after Cordaro sold MRSS and went to work for Southland, he found himself shifting from being a business proprietor to an employee, and he found that it changed his entire tax structure. In conversations with Kay it was discussed that he could enjoy certain tax advantages by maintaining a business enterprise in his own name, and one way to do this would be for him to own and operate an SMR station. Tr. 1275-1276. It was as a result of this conversation that Kay assisted Cordaro in obtaining the Rasnow Peak SMR license and entered into a management agreement with Cordaro for the station. *Id.*

121. VSC Enterprises is a consulting business started by Cordaro before Kay purchased MRSS. It is still in existence today. Tr. 1837. During the hearing Cordaro denied that VSC used radios or ever told Kay that VSC had a need for radios. Tr. 1837-1838. In 1992 Jim Doering, another SMR operator in the Los Angeles area had filed a protest against an SMR end user application filed by Vincent S. Cordaro d/b/a VSC Enterprises, arguing that Kay was the real party in interest behind the application. A responsive letter dated September 4, 1992, was filed jointly on behalf of Cordaro and Kay by Brown and Schwaninger. WTB Ex. 351. The letter response stated:

> Separate and apart from his work for Kay . . . , Cordaro also operates a radio communications consulting company. . . . Prior to undertaking employment from Kay, Cordaro operated an independent business. Part of the understanding under which Cordaro is employed by Kay is that Cordaro is free to engage in any line of business which is not in conflict with his work for Kay. . . . If Cordaro is granted the license which he requests, he will operate the units which he requests as an individual and in pursuit of his independent business activities. Accordingly, Cordaro, and not Kay, is the real party in interest in Cordaro's application.

WTB Ex. 351 at p. 2.

122. Attached to the September 4, 1992, letter was an affidavit, executed by Cordaro on September 4, 1992, in

which he "declare[d] under penalty of perjury under the laws of the United States that the foregoing document is true and correct." *Id.* at p. 5. Cordaro admits that it is his signature on the affidavit. Tr. 1841. He says he does not remember whether he saw the September 4 letter before he signed the affidavit, Tr. 1841, but the record indicates that an undated draft of the letter, along with a draft of the affidavit, that had been faxed by Brown and Schwaninger on September 3, 1992, was in Cordaro's possession. WTB Ex. 314; Tr. 1908-1920. It is not Cordaro's practice to sign official documents without reading them. Cordaro acknowledged that the September 4, 1992, affidavit he signed is only one sentence long, that it very clearly made reference to another document, and that he therefore knew when he read and signed it that another accompanying document was involved. Tr. 1920.

(3) *Jerry Gales*

123. Kay has known Jerry Gales since the 1980's. Tr. 1240. Gales was an SMR operator in the Los Angeles area long before Kay knew him. He operated a trunked system at Oat Mountain and another conventional channel that Kay later purchased from him. Tr. 1243. Gales had health problems which prevented him from doing many of the physical things associated with maintaining an SMR, *e.g.*, going up to the mountain tops, *etc.*, so he made an arrangement with Kay so that Kay's people could handle those matters. Tr. 1243. WTB Ex. 326 is a written management agreement, dated November 2, 1994, between Gales and Kay, with respect to Station WPFF295. Gales and Kay had an oral arrangement regarding this station prior to November 1994, and it would probably have been entered

into about the time Gales first obtained the license for this station. Tr. 1240-1241. Under this arrangement, Kay would provide the equipment, construction, and maintenance of the station, and would market services on the station. Tr. 1245. Gales did not participate in the physical construction and maintenance of the station due to his health condition, but he knew personally the persons who would have done it, *i.e.*, either Kay or Marc Sobel. Tr. 1242, 1245-1246. In partial compensation under this arrangement, Kay provided Gales with free office space at his Van Nuys facility so that Gales could continue to pursue his land mobile sales and marketing activities. Gales operated out of the free office provided to him by Kay from mid-1990 until approximately 1996. Tr. 1244.

124. The station was managed in largely the same manner as the stations Kay managed for Marc Sobel and Vince Cordaro. Tr. 1280. Kay understood that the written agreement was a standard boilerplate agreement used by Brown and Schwaninger. Tr. 1246. It was "[o]ne hundred percent prepared by [Brown and Schwaninger]. They apparently used it for all their clients." Tr. 1247. Kay later learned that after the Commission had designated Marc Sobel for a license revocation hearing based on this agreement, Brown and Schwaninger did "the equivalent of an automotive recall of all these agreements and re-wrote them and even notified all their clients if they had one of these contracts it needed to be rewrote." Tr. 1247.

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(5) *Carla Marie Pfeifer*

125. Kay and Carla Pfeifer first became acquainted in the mid-to-late 1970's. Tr. 1538. At that time Kay operated a shop dealing with citizen's band and side band radios, and Ms. Pfeifer's first husband, who was getting involved in CB, met Kay through a friend. Kay, Pfeifer, and Pfeifer's first husband became social friends. Tr. 1539. Kay and Pfeifer were in the same bowling league, and they gathered together at friends' homes for holiday dinners, birthdays, or just to visit. Tr. 1575. This was a long term relationship. *Id.* Pfeifer was never employed by Kay, but, on and off during the time from the early 1980's to the early 1990's she did occasionally visit his shop on Saturdays and would pitch in and help with customers if Kay's staff was too busy. Tr. 1539-1540. This was something that happened very sporadically, that she did simply out of friendship with Kay, and for which she did not get paid. Tr. 1574-1575.

126. WTB Ex. 305 is an SMR repeater license (Call Sign WNHD783), issued January 23, 1990, to Carla Pfeifer, authorizing a facilities on 851.3625 and 854.3875 MHz at Castro Peak, Malibu (Los Angeles) California. Kay assisted Pfeifer in obtaining this license pursuant to an arrangement whereby Kay was to construct the station and market service and when it was filled with users Pfeifer would share in the service revenues. Tr. 1541-1542. Pfeifer saw this as a business opportunity for herself as well as for Kay—she viewed it as a venture which, if successful, would make money for her as well as for Kay. Tr. 1575. Pfeifer explained that one of the reasons for this particular arrangement was that Kay was in a better position financially and professionally to finance and implement the station. Tr. 1576.

127. At the time Pfeifer's conventional SMR authorization for Castro Peak (WTB Ex. 305) was issued, Kay would have been eligible to have held an authorization for the same facilities. Without regard to loading on any existing facilities he may have held at the time, he could have nonetheless applied for the same facilities specified in WTB Ex. 305 as a conventional SMR along with a packaged end user application, or he could have applied for the same facilities as a community repeater operator in the business radio service. Tr. 2432-2433. A "package" filing is one in which the SMR base station license application and one or more end users license applications are filed simultaneously, such that the number of end users being authorized is sufficient to fully load the channel. In this situation, any loading or lack thereof on existing facilities held by the base station applicant is irrelevant because the new base station "would be granted into a fully loaded environment." Tr. 2343. This was a method frequently used by Kay, Tr. 976, and the record reflects at least one example of such an application that was in fact granted by the Commission. WTB Ex. 311; Tr. 2437-2439.

128. A number of documents were entered into evidence purporting to bear the signature of Pfeifer, but as to which she questioned whether the signatures were in fact hers. Pfeifer testified: "I have discovered over some time that there have been some papers that have been submitted to FCC that I feel are not my signature." Tr. 1554. She offered no independent basis for this belief, however, other than her subjective determination that some of the signatures do not look to her like her own. Thus, while signature on a letter to the FCC dated August 31, 1987 (WTB Ex. 299), "appears to

be my signature . . . I cannot guarantee it is my signature." Tr. 1554. Similarly, she questions the signature at item 11 of a NABER frequency coordination form (WTB Ex. 303): "It appears to be my signature , but I do not believe it is my signature. . . . It does not look like my writing." Tr. 1557-1558. When pressed as to what in particular caused her to question the signature, she simply said it was "[t]he whole signature." Tr. 1558. Assuming it is not her signature, she does not know who wrote it. Tr. 1559. Pfeifer further stated that she does not believe it is her signature on a letter to the FCC dated August 4, 1987 (WTB Ex. 304): "The signature on this particular document in no way looks like my signature." Tr. 1559-1560.

129. A number of other documents bear signatures that appear no more or less dissimilar than those discussed above, but which Pfeifer admitted were signed by her. These include: (a) a check dated August 28, 1996 (WTB Ex. 296) Tr. 1546, 1578; (b) a NABER frequency coordination form, at item 11 (WTB Ex. 295) Tr. 1548; (c) a check dated August 28, 1987 (WTB Ex. 302) Tr. 1556; (d) a letter to the FCC dated August 19, 1988 (WTB Ex. 297) Tr. 1557; (e) a letter to the FCC dated August 3, 1987 (WTB Ex. 298) Tr. 1557-1558; and (f) an invoice (WTB Ex 301) Tr. 1578. The Bureau did not produce the original documents in question, nor did it present any forensic evidence that the signatures were in fact not those of Pfeifer, much less who (if not Pfeifer) wrote the signatures.

130. Kay expressly denied signing Pfeifer's name to virtually any document in the record purporting to bear her signature, Tr. 2342, 2345-2347, including specifically the

documents as to which Pfeifer specifically questioned the genuineness of her signature. Tr. 2435 (WTB Ex. 299), Tr. 2436-2437 (WTB Ex. 303), and Tr 24237 (WTB Ex. 304). When Kay prepared applications or other FCC-related documents on behalf of Pfeifer, he made copies of them and gave them to her. Tr. 2346. The Bureau did not produce the originals of the documents bearing Pfeifer's signature, and it further appears that the copies in the record did not come from the Bureau's files. None of the documents bears an FCC date receipt stamp, and most of the documents discussed above are labeled across the top with the words "Carla Attachment" and a number. The Bureau does not know whether these are copies of documents from the FCC files or copies of documents which Ms. Pfeifer herself provided to Bureau investigators. Tr. 2334.

(6) *Oat Trunking Group, Inc.*

131. Oat Trunking Group, Inc. (OTG) is a corporation of which Kay is the President and sole shareholder. Tr. 862-863. OTG has never had any payrolled employees. Tr. 863, 1267. WTB Ex. 312 is an application in the name of OTG for a community repeater base station together with 29 mobile units. Kay explained the purpose of the application as follows:

> I was going to use it to hold a license for a community repeater and have my corporation share use of that station with other users in accordance with the sharing rules of the FCC, so that's perfectly permissible. I can also have Buddy Corporation employees use the station. Sister

> corporations with the same management can share stations with each other. There was nothing extraordinary or abnormal about it, sir.

Tr. 1267-1268.

132. The application is signed by Vincent Cordaro who was at that time an officer of OTG. Tr. 863. Asked why Cordaro, rather than Kay, had signed the application, Kay explained:

> I don't recall the precise reasons. If I were to make a best estimate, it's because at that time I was trying to get Mr. Cordaro more involved in the operations of my company to possibly even become an owner in my company. This was dated I think that's 6-8-92. That would be just after he became the general manager of my company, and he wanted to be more involved and possibly become an owner of the company. Since that didn't work out for him is I think one of the reasons he ultimately left my employ. He wanted more than just to be an employee.

Tr. 1268-1269. Kay's association with OTG was never concealed from the Commission. He is listed as the application preparer on the FCC Form 574 in WTB Ex. 312. Another application filed in the name of OTG at approximately the same time sought to convert an existing conventional station to a community repeater. WTB Ex. 311. That application was also signed by Cordaro and also lists Kay as the preparer. *Id.* at p. 2, item 37. It also conspicuously

identifies Kay as the licensee of an associated SMR facility. *Id.* p 2, item 38. The transmittal letter covering the application, moreover, is signed by Kay and very clearly explains Kay's involvement in the proposal. *Id.* at p. 1.

Interference Issue

133. In May 1992, Paul Oei, an electronics engineer employed in the Commission's Los Angeles field office, Tr. 1345, 1360-1361, accompanied another FCC employee, Mr. Ben Nakamiyo, on an investigation of an interference complaint against Kay. Tr. 1352-1353. Nakamiyo, not Oei, was the FCC official responsible for the investigation, and Oei was along on the trip as part of his training. Tr 1361-1362. Jim Doering, another Los Angeles SMR operator and a competitor of Kay, had complained that Kay was rebroadcasting one or more signals from one frequency onto another from his Van Nuys office location. Tr. 1353. Doering complained that these retransmissions were causing interference to a facility licensed to him on the frequency 854.4875 at Santiago Peak. Tr. 1370.

134. Nakamiyo and Oei visited Kay's office location at Van Nuys and asked to inspect a control station there. Tr. 1353. Oei testified that a control station normally has a microphone attached to it, but that in this case the control station has a wire or cable connected where the microphone normally would have been. Tr. 1354. Oei testified that Nakamiyo's notes indicated that Kay removed the cable and replaced it with a microphone during the inspection, although Oei himself does not recall observing this. Tr. 1363. Either Nakamiyo or Oei took power measurements from the control station, and Oei took down notes. Tr. 1363.

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135. The repeater channel in question that was the subject of the interference complaint was the frequency pair 809.4875 MHz and 854.4875 MHz. The frequency 809.4875 MHz is known as the "input," *i.e.*, the frequency on which mobiles and control stations transmit into the repeater and on which the repeater receives their transmissions. The frequency 854.4875 MHz is known as the "output," *i.e.*, the frequency on which the repeater re-transmits the signal it receives and the frequency on which mobiles and control stations receive the repeater transmissions. Oei and Nakamiyo monitored the allegedly interfering signal simultaneously on the input and output frequencies, and used direction finding techniques to determine that the transmissions on the input frequency were emanating from Kay's Van Nuys office location. Tr. 1365. Oei does not recall whether they made any attempt to determine the source of the transmissions on the output frequency, *i.e.*, which repeater the transmissions were being sent through, Tr. 1365, 1380, and there is no indication in the record that any such determination was ever attempted.

136. During the May 1992 inspection, Kay produced a license, issued to Buddy Corp., that authorized a control station at the Van Nuys location for the purpose of controlling SMR Stations WNMY402 and WNJA910. Tr. 1367-1368. This license authorized transmissions from the fixed location at Kay's office on the input frequency of repeater channels authorized on those two call signs. Tr. 1368-1369. Station WNJA910 is authorized for the base station frequency 854.4875 MHz at Oat Mountain and was so authorized at the time of the May 1992 inspection. Tr. 1369. This is a trunked station, authorized as a "YX," and therefore has exclusive use within a 70 mile radius. Tr. 1381-1382.

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137. The Oat Mountain site is less than ten miles from Kay's Van Nuys office location. Tr. 1365-1366. The Santiago site is more than 70 miles away from Oat Mountain. Tr. 1383. Oei admitted that the Buddy Corp. control station license authorized Kay to control the WNJA910 repeater (*i.e.*, make transmissions on the repeater input frequency) from the Van Nuys location without prior monitoring because the repeater was licensed as a "YX" with exclusive use and the Van Nuys control station was within a 20 miles radius of the Oat Mountain repeater site. Tr. 1381-1382. He felt, however, that Kay's "link" configuration (in which Kay was apparently receiving transmission on the output of Station WNMY402 and retransmitting them on the input of WNJA910) was improper because he was using the link as a repeater rather than as a control station. Tr. 1381. Oei could not, however, cite a specific rule that prohibits the described configuration. Tr. 1383.

138. Kay gave testimony fully describing and explaining the station that was inspected in May 1992. It consists of four devices: a power supply, two EF Johnson 800 MHz trunked radios (Model No. 8615), and a Rayfield Easy-Link unit that connects the two radios together. Tr. 2484-2485. Kay operated the two EF Johnson radios pursuant to the Buddy Corp. control station license which authorized him to control Stations WNMY402 (Mount Lukens) and WNJA910 (Oat Mountain) from his Van Nuys office location. Both locations are less than twenty miles from Kay's Van Nuys office. Tr. 2486. The configuration takes output from the Oat Mountain repeater and retransmits it through the Mount Lukens repeater, and vice versa. Tr. 2487-2488.

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139. The back-to-back linking of two radios in the configuration used by Kay is accomplished with standard, readily available equipment and in full accordance with manufacturer intentions and recommendations. Tr. 2489; Kay Exs. 44 & 45. The purpose of this is to extend the coverage or "footprint" of each repeater, thereby improving service to the end users. Tr. 2485-2488. Thus, for example, a mobile unit located in Hollywood that can not access the Oat Mountain repeater but can access the Mount Lukens repeater will, by virtue of this configuration, be able to communicate through both repeaters and thus enjoy a much larger service area. Tr. 2488. James P. Hanno, who has over twenty years experience in the land mobile industry as a licensee, an equipment vendor, and as a consultant, testified as follows:

> I have also been asked to comment on the use in the land mobile industry of devices which allow the linking of remote repeater sites. I am familiar with such devices. Essentially, the device receives the output frequency of a channel on one repeater and relays it on the input frequency of a different channel on a repeater at a different location. The device may be co-located with one of the repeater sites, or it may be located at an intermediate point between the two repeaters. This is a common practice in the industry. Its purpose is to extend the communications range of the customer. Without the link, the customer can only communicate to points within the footprint of the specific repeater he is operating on. With the link, his coverage area includes the footprint of the repeater he is operating on plus the footprint of

> the linked repeater. Several equipment vendors offer off-the-shelf devices designed expressly for this purpose.

Kay Ex. 63 at ¶ 12.

140. Kay understands that he is obligated to avoid interference by coordinating his usage of a non-exclusive channel with other properly licensed co-channel users within a 70 mile radius. Tr. 970. Where he has exclusive use of channel, such as in the case of a licensed "YX" trunked system, however, and operates within the scope of his authorization, he does not believe he is responsible for possible interference to stations located beyond the 70 mile separation. Tr. 2490-2491. Indeed, Mr. Kay testified that Paul Oei had used the term "legal interference" to describe the situation in which two co-channel stations, both properly licensed and separated by one another by the prescribed distance, and both operating within the scope of their authorizations, may nonetheless sometimes interfere with one another. Tr. 2491. For example, Kay's Los Angeles repeater operations often experience "legal interference" from stations operating in San Diego. *Id.* Kay explained that this is simply an unavoidable consequence of the fact that "the radio signals unfortunately don't politely end at the end of your authorized service area, and often times do play with the other guy's operations." *Id.*

141. Roy Jensen testified that "[t]here were a couple of circumstances that [Kay] explained to me where he claimed to have" interfered with other operators. Tr. 1467. Jensen did not observe this and could give no specific instances of

his personal knowledge. Jensen acknowledged that Kay's descriptions of interference situations, schemes, and techniques were "explained to me just because of necessity, understanding customer problems." Tr. 1466. Jensen also acknowledged that there would have been legitimate business reasons for Kay to understand and discuss intentional interference techniques. "[I]f a customer complains about the interference, being able to track it down is a valuable skill." Tr. 1476.

142. Even in the one instance in which Jensen claims to have observed Kay jamming from the tech room at Lucky's, Tr. 1468-1469, Jensen stated that Kay did not hold the channel open for very long and that "[i]t was kind of a demonstration of concept type thing." Tr. 1470. Jensen claims that Kay used a service monitor to transmit on a repeater input to lock onto a repeater, but he does not know what frequency Kay was allegedly transmitting on or what repeater he allegedly locked onto. Tr. 1477-1478. Similarly, while Jensen alleges that Kay claimed to have jammed other operators, he does not know any specific repeater or company name. Tr. 1471.

Effect of De Facto Control Issue[22]

143. Sobel has been involved in the land mobile radio business in the Los Angeles area since approximately 1976. Tr. 1707-1708. Sobel was involved in the business before

22. This issue, as framed by Judge Sippel, was to determine "[w]hether, based upon the findings and conclusions reached in WT Docket No. 97-56 concerning Kay's participation in an unauthorized transfer of control Kay is basically qualified to be a Commission licensee." MO&O 98M-15 at p. 7.

Kay, and actually is the one who introduced Kay to it. Tr. 1712. Sobel is a two-way radio dealer. He sells and services radios, he provides repeater service, he installs and maintains, systems for users and for other dealers, and provides consulting services. Tr. 1708. Sobel first became interested in obtaining authorizations for 800 MHz facilities in the early 1990's. Tr. 1707. Prior to that time, his repeaters were operated in the UHF bands (450 MHz and 470-512 MHz). Tr. 1709.

144. Kay and Sobel have been friends for twenty years. WTB Ex. 228 at p. 71; WTB Ex. 229 at pp. 326-327. In the early 1990's, when Sobel became interested in obtaining 800 MHz repeater licenses, he approached Kay for assistance. Tr. 1712. By this time Kay had developed a repeater business that had far surpassed Sobel's in size and scope. *Id.* There were several reasons why Sobel turned to Kay for help in pursuing 800 MHz licensing. Kay already held 800 MHz licenses and was familiar with the rules and procedures which were different than for UHF applications. Also, Kay and Sobel were good friends, Sobel trusted Kay's judgment. Tr. 1712-1713.

145. Kay helped Sobel locate target frequencies to apply for, but Sobel was directly involved in the process. Sobel did not merely accept Kay's recommendations without input or question. Indeed, Sobel sometimes rejected Kay's initial suggestions based on his own information regarding the local industry and environment. For example, in at least one case he declined an initial recommendation because he would have been on the same frequency as a competitor he considered too aggressive. In other cases he determined that the existing

loading on the channel by other pre-existing licensees did not permit the authorization of enough mobile units to make pursuit of the channel worthwhile. Tr. 1714.

146. Kay prepared the 800 MHz applications at Sobel's direction and on Sobel's behalf. This was primarily because Kay already had specialized software to do so. Tr. 1714-1715. It was also easier for Kay to do this because he already had the technical information for many of the sites in his computer system. Tr. 1713. Sobel sometimes prepared the applications himself using Kay's computer. Tr. 1715. Regardless of who prepared the 800 MHz applications, however, Sobel always reviewed and signed them. Tr. 1715. Kay never filed an application on behalf of Sobel that was not first reviewed, approved, and signed by Sobel. Tr. 1715-1716. It is typical in the land mobile industry for someone other than the licensee to prepare applications. Licensees rely on frequency coordinators, application preparation firms, equipment vendors, *etc.*, for the preparation of Part 90 applications, even including assistance in selection of frequencies to be applied for. Tr. 1716-1720. If Sobel had engaged the services of a frequency coordinator or an application preparation firm, the services provided would not have been significantly different than those provided by Kay. Tr. 1719.

147. Sobel's home address was used on all applications. Kay has no access to this location, and, therefore, all correspondence regarding Sobel's 800 MHz applications were directed to Sobel. Other than information that might appear on public notice, Kay would have no knowledge of Commission correspondence regarding the 800 MHz applications and licenses except through Sobel. Tr. 1720-

1721. Sobel's home address was also designated as an authorized control point on the 800 MHZ licenses. Tr. 1721-1722.[23]

148. When Sobel began to receive grants of the 800 MHz licenses, he entered into an oral arrangement with Kay. The essence of the deal was that Sobel would install the stations using equipment Kay had in his inventory; Kay would provide repeater site space for most (but not all) of the stations; Kay would market the system (*i.e.*, resell airtime to end users); and Sobel and Kay would split the revenues beyond the first $600 per month per repeater (the first $600 going to Kay to compensate him for the equipment, site rental, *etc*). Tr. 1723.

149. Sobel viewed this as a good business arrangement for himself on a number of scores. First, it allowed him to obtain and implement 800 MHz authorizations without having to spend the $6,000 to $7,000 per repeater that would otherwise have been required for the equipment, not to mention the monthly expenses. Tr. 1724. Sobel would also receive an immediate initial return in the form of the hourly rate he charged Kay for installation and maintenance services—functions that he would have performed for no compensation had he decided to pursue the 800 MHz stations independently of Kay. Tr. 1724-1725.

150. It was also advantageous to Sobel to have Kay resell airtime on the 800 MHZ repeaters rather than for Sobel to

23. As explained by Sobel, the control point is where you maintain control over your station. Tr. 1721-1722. See Section 90.429 of the Rules.

have to market them on his own. Sobel's land mobile business is a one-man operation which keeps him personally occupied at least 30 to 60 hours per week, and sometimes as much as 70 hours per week. Tr. 1726-1727. Kay, by comparison, had a sales staff in place and was already actively marketing 800 MHz services. Tr. 1726.

151. While Sobel could have made the decision to construct, operate, and market the 800 MHz stations independently of Kay, he determined that the arrangement with Kay made good business sense. On his own he would have had to purchase repeater equipment (at approximately $6,000 to $7,000 per repeater), or lease it (at a monthly cost of $200 to $300 per repeater). Tr. 1727. He would also have been required to lease repeater site space. Tr. 1728. In addition, Sobel would not have received compensation for having installed and maintained the stations—thus, he would have been required to do this work himself for no compensation or contract it out, thereby incurring further expense. Tr. 1728-1729.

152. Sobel is not an absentee owner of the management agreement stations. He resides in the stations' service area and is a hands-on owner who has remained actively and fully involved in all aspects of the day to day operations. Except for matters specifically and directly related to Kay's resale of airtime, Sobel has been solely responsible for and directly involved in daily operations. Sobel constructed the facilities and he maintains them. WTB Ex. 328 at pp. 104, 107. He regularly monitors the repeaters and frequently visits the transmitter sites. WTB Ex. 328 at p. 117; Tr. 1734-1735.

153. The price to be charged for repeater service is largely dictated by local industry standard, and Sobel has personally determined when to make adjustments. WTB Ex. 328 at p. 123. He has, on occasion, overruled Kay's initial determination as a reseller regarding the rates to be charged. When special deals are negotiated, Sobel either handles it or knows about it. *Id.* at pp. 129-130. Sobel has the right to approve or disapprove any service contracts entered into by Kay. *Id.* at pp. 128-129. Sobel reviews Kay's customer contracts approximately once or twice per month. *Id.* at p. 122. Sobel also reviews with Kay the decisions regarding which customers to place on which repeaters. *Id.* at p. 123.

154. Kay prepared much of the FCC and frequency coordination paperwork for the 800 MHz repeaters, subject to Sobel's supervision, review, and approval. This was a matter of convenience. Kay had a special software package that generated the appropriate forms. WTB Ex. 328 at pp. 74-75. On some occasions Sobel actually prepared the applications himself using Kay's computer. *Id.* at p. 74. Nothing was ever filed with the Commission on Sobel's behalf before Sobel reviewed, approved, and signed it. Tr. 1715-1716. This was more than token approval. Sobel is intimately familiar with the application forms and procedures, having prepared his own UHF repeater applications as well as many applications for his clients and customers, Tr. 1714.

155. As previously discussed, the arrangement provided that Kay would provide space to Sobel at some of the sites. At a few sites Sobel leases space from persons other than Kay, and at one site Sobel subleases space to Kay. At the other sites, Sobel either leases or subleases space from Kay.

Tr 1732. Where the space is provided by Kay for Sobel's UHF repeaters (which are otherwise entirely independent of Kay), Sobel makes monthly cash payments to Kay. Tr. 1727. Kay's provision of space for the 800 MHz repeaters, however, is included as part of the arrangement with Sobel. Tr. 1723. A typical mountain top repeater site is a small building, perhaps 1,200 to 1,500 square feet, and some even smaller, next to a tower or antenna structure. Tr. 1710. Inside the building are equipment racks and cabinets, wiring and cabling, transceivers, power supplies, *etc*. Tr. 1710-1711. A small building may house only about five repeaters, while a larger one may have more than 100. Tr. 1711. A given building may house multiple licensees. It is quite common in the Los Angeles land mobile radio community for multiple licensees, even competitors, to share a common repeater and antenna sites in order to realize economies of scale. Tr. 1711, 1732-1733.

156. The arrangement between Sobel and Kay is nothing more than a lease of channel capacity or airtime to Kay which Kay then resells. This is a common arrangement in the Los Angeles land mobile radio community, and one that is perfectly legal under the FCC's policies and precedents. There are several dealers in the Los Angeles area who provide repeater service to their customers without holding any licenses of their own. They do this by marketing services and/or reselling airtime on repeaters licensed to other operators. Tr. 1739-1740.

157. Consistent with the fact that Kay is operating as a reseller of airtime on Sobel's 800 MHz repeaters, the customers on Sobel's 800 MHz repeaters are Kay's (not

Sobel's) customers. Sobel nonetheless remains fully aware of who are the customers. Sobel typically does the account activations and deactivations. Tr. 1741, 1744. Sobel has unrestricted access to the customer contracts. Tr. 1741. Repeater service agreements are fairly standard, and Sobel is familiar with the structure. Tr. 1741.

158. In the fall of 1994, Sobel became aware of a draft hearing designation order in the Kay proceeding. Kay had obtained the draft through a FOIA request and he informed Sobel of it. Tr. 1751-1752. The draft *HDO* contained the following language.

> Information available to the Commission also includes that James A. Kay, Jr. has done business under a number of assumed names. We believe that these names include some or all of the following: Air Wave Communications . . . [and] Marc Sobel dba Airwave Communications.

Kay Ex. 5 at p. 2, ¶. Air Wave Communications is a name under which Marc Sobel does business. Tr. 1152-1153, 1752.

159. Sobel was surprised upon learning of this language suggesting that he was nothing more than an alias of James Kay. Tr. 1752-1754. As Sobel explained:

> I was surprised, because, as you can see, I'm a real person. I'm not an alias of James Kay, clearly. My business is my business. Air Wave Communications, he has nothing to do with it. He's not a partner, he's not part of the d/b/a and it

> was just an absolute surprise and a little bit of anger that they should include my name in their process of the *HDO* against James Kay. In other words, I thought it was entirely unfair and inappropriate.

Tr. 1753. Kay Ex. 6 is a letter, dated December 6, 1994, which Sobel wrote to Gary Stanford of Bureau staff in Gettysburg. The purpose of this letter was to correct the apparent misbelief of the Commission that Sobel was a fictitious name being used by Kay rather than a real, separate individual. Tr. 1557-1559. In the letter, Sobel advised the Commission:

> I would like to assure you that I am an Independent Two Way Radio Dealer. I am not an employee of Mr. Kay's or of any Mr. Kay's companies. I am not related to Mr. Kay in any way. I have my own office and business telephone numbers. I advertise under my own company name in the Yellow Pages My business tax registration and resale tax permits go back to 1978—long before I began conducting any business whatsoever with Mr. Kay.

Kay Ex. 6 at p. 1. Sobel closed the letter with the following invitation: "Should you need further assistance . . . in this matter, please call me at your earliest convenience." *Id.* at p. 2. Neither Stanford nor anyone else from the Commission ever responded to Sobel's letter. Tr. 1559.

160. After learning of the draft *HDO*, Sobel asked Brown and Schwaninger to prepare a written agreement to document the relationship between him and Kay. The purpose

of drafting such a written agreement was "to clarify our separateness, our positions as two businesses, and our relationship in my station that [Kay] managed." Tr. 1761. Sobel was not in any way dissatisfied with Kay's performance under the pre-existing oral arrangement. He had no reason to distrust Kay, and he had no desire to modify the relationship. Tr. 1764. Indeed, the parties did not change their relationship after the agreement was placed in writing—the written agreement was simply intended to clarify their position on paper. *Id.*

161. WTB Ex. 339 is a copy of the written management agreement between Sobel and Kay as executed on October 28, 1994. Brown and Schwaninger did not provide Kay and Sobel with preliminary drafts of the agreement; rather, it was their understanding this was a standard boilerplate agreement used by Brown and Schwaninger with all their clients. Tr. 1246, 1763. In fact, Kay had been advised by Brown and Schwaninger that "the management agreements met the FCC rules on all four corners." Tr. 2445.

162. Paragraph VIII of the written management agreement expressly provides:

> *Supervision by Licensee*: Licensee shall retain ultimate supervision and control of the operation of the Stations. Licensee shall have unlimited access to all transmitting facilities of the Station, shall be able to enter the transmitting facilities and discontinue any and all transmissions which are not in compliance with FCC Rules and shall be able to direct any control point operator

> employed by Agent to discontinue any and all transmissions which are not in compliance with FCC Rules. All contracts entered into with end users of the Stations' services shall be presented to the Licensee, either by original proposed contract or copy thereof, before such contracts go into effect, and Licensee shall have the right to reject any such contract within five (5) days of presentation, however, such rejection shall be reasonable and based on the mutual interests of the parties. Licensee shall have the right to locate the Stations' transmitting facilities at any place of Licensee's choosing, provided, however, that after the original construction of the transmitting facilities of the Stations is completed and/or following execution of this agreement, Licensee shall give sixty (60) days notice to Agent of any future relocation of any of the Stations. Such relocation shall only occur if it is in the best interest of both Parties.

WTB Ex. 339 at p. 5, ¶ VIII.

163. WTB Ex. 340 is a copy of a virtually identical replacement agreement executed on December 30, 1994. The agreement was re-executed because Kay had initially neglected to pay Sobel a $100 fee to effectuate an option provision in the written agreement, and in order to expand the list of call signs covered by the agreement. WTB Ex. 228 at pp. 110-111; WTB Ex. 341. The agreement gives Kay an option to acquire any one of the Sobel stations for $500. Sobel and Kay both understood an option to be a "future"

right that may or may not ever be exercised. Tr. 1303, 1744-145. In fact, Kay has never exercised the option provision. Tr. 1746. Prior to the written agreement, the parties had an understanding that Kay would have either an option or a right of first refusal. Tr. 1745-1746. Kay required this protection because he would be writing five year service contracts to resell service on the stations and needed to be assured of continued access to the channel capacity. WTB Ex. 229 at pp. 365-366.

164. Prior to the written agreement, the parties also had a long-standing understanding that if the stations were ever sold, Kay would share in the proceeds to compensate him for work he had done and expenses he had incurred in clearing the channels. Tr. 1747. All of the frequencies subject to the management agreement were, at the time they were acquired by Sobel, encumbered by other users, i.e., there were other licensees authorized to share use of the channels. Tr. 1747-1748. The process of "clearing" channels, researching the status of co-channel licenses, obtaining cancellation of inactive stations, negotiating assignments or cancellations of other licenses, *etc.*, involved a great deal of work that Kay was in a better position to undertake. Tr. 1748.

165. Sobel was not, in any event, generally in the mode of selling stations. Tr. 1749. On the rare occasion when one of the management agreement stations was sold, the parties did not follow the specific terms of the option provision even after the written agreement was executed. For example, on one occasion Kay negotiated a deal with a third party whereby Sobel received $20,000 from the sale of one of the channels, event though under the literal terms of the written agreement

Kay could have exercised his $500 option and diverted the additional monies to himself. Tr. 1746. On another occasion, Kay approached Sobel with an offer he had received from a third party to acquire all of the management agreement stations for $1.5 Million. Sobel turned down the proposal and decided to keep the stations. Tr. 1749. This was at a time when Kay needed the money and could have exercised his option to acquire each of the stations for only $500, but he instead went along with Sobel's desire to retain the stations. *Id.*

166. Under the oral arrangement between Kay and Sobel, Kay provided the equipment, but it was being leased to Sobel for use in the management agreement stations. Indeed, it was in large measure to compensate Kay for the provision of this equipment that it was agreed that Kay would receive the initial $600 in revenue each month. The written agreement, however, expressly provides: "Agent [*i.e.*, Kay] shall lease to Licensee [*i.e.*, Sobel] all equipment necessary to construct and operate the Stations. All rents to be collected by Agent for lease of equipment to Licensee shall be deemed by the Parties to be a portion of Agent's compensation for services described herein." WTB Ex. 340 at p. 3 ¶ IV.

167. The written management agreement prepared by Brown and Schwaninger is no longer in effect, having been replaced by a revised agreement drafted by Kay's current regulatory counsel. Tr. 2370-2377; Kay Ex. 64. Kay explained that the new agreement was prepared and executed

> [b]ecause while we believed the initial agreement was perfectly legal on all four corners, the Commission's scrutiny and the ruling that came from the Marc Sobel matter clearly indicated that the

> agreement may have some problems. So, we have had counsel draft a new agreement which hopefully will be more on all four corners with the Commission's expectations and we executed the new agreement.

Tr. 2371.

Misrepresentation and Lack of Candor Issue

Background

168. The issue added by Judge Sippel, requested by the Bureau in its Motion to Enlarge Issues filed on December 30, 1997, seeks a determination whether Kay "misrepresented facts or lacked candor in presenting a Motion to Enlarge, Change, or Delete Issues that was filed by Kay on January 12, 1995 and January 25, 1995.[24, 25] Judge Sippel's' [sic]

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24. Kay's motion was initially misfiled with the Commission on January 12. An identical motion was then refiled with Judge Sippel on January 25.

25. The Bureau sought unsuccessfully to add the same issue in a motion to enlarge filed April 9, 1997. See *MO&O*, FCC 97M-183, released November 5, 1997. The Bureau' requested was posited on the contention that the December 30, 1994 Management Agreement between Kay and Sobel could not be reconciled with Kay's January 25, 1995 representation that he did not have an interest in any of Sobel's stations or license. Page 5. The Bureau was silent as to when it was given a copy of the Management Agreement. However, it was pointed out in the Opposition that a copy of the Management Agreement had been given by Kay to the Bureau in March 1995, a fact which the Bureau was forced to admit. Reply, Page 15. However, as discussed, *infra*, the Bureau never apprised Judge Frysiak of that critical fact.

addition of the issue was predicated on Judge Frysiak's conclusion that Sobel misrepresented facts in asserting in his January 25 affidavit that Kay did not have an interest in his stations. Judge Frysiak's conclusion rests, in large part, on his determination that Sobel intentionally concealed the Management Agreement between Kay and Sobel disclosing their relationship until July 3, 1996, in response to a 308(b) inquiry. See *Marc Sobel*, 12 FCC Rcd 22879, 22897, 22902 (ALJ, 1997).

169. Judge Frysiak's decision was tainted because the Bureau deliberately concealed the fact that Kay had given a copy of the Management Agreement to the Bureau on March 24, 1995.[26] Thus, in reaching his conclusion, the Judge was unaware of the March 24, 1995 filing and erroneously assumed that the Commission first received a copy of the Management Agreement on July 3, 1996. The Bureau concealed this information because it recognized that divulging that Kay gave a copy of the Agreement to the Bureau more than 2 years before the Bureau raised questions about the January 25, 1995 declaration seriously eroded its contention that Kay and Sobel intentionally deceived the Commission about their relationship, a necessary element in a misrepresentation finding. See *Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129 (1983). The following chart lays out the Bureau's elaborate scheme.

a. *Designation Order in Sobel Case released February 12, 1997.*[27] Order recites that the Commission first

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26. Official notice taken of *Kay's Responses to Wireless Bureau's First Request For Documents.*

27. 12 FCC Rcd 3298, 3299 (1997).

learned of the Management Agreement on July 3, 1996 when it received a copy from Sobel pursuant to a 308(b) letter of inquiry. Commission not informed of March 1995 filing of Agreement.

b. *Motion to enlarge issues filed April 3, 1997.* Motion does not disclose that a copy of the Agreement was given to the Bureau in March 1995. Opposition recites: "Sobel has attempted in discovery in this proceeding to determine precisely when the Bureau became aware of and received a copy of the Agreement, but the Bureau has thus far refused to provide such information." Note 8. Bureau Reply filed May 1, 1997 continued to conceal March 1995 filing. Bureau also casts doubt on the Sobel Opposition by claiming inconsistency between Sobel's statements that he thought filing was made with the January 25 Declaration and that it had been filed in Kay discovery, an attack plan used in the hearing itself.

c. *MO&O, FCC 97M-82, released May 8, 1997.* Filing of Agreement in March 1999 [sic] was not disclosed by the Bureau.

d. *Hearing on Misrepresentation Issue.* Bureau sought to block out and cast doubt on testimony of Sobel that Agreement was to be filed with Kay discovery. Bureau Ex. 329, Tr. 300-304. Bureau, in examination of Sobel, seeks to establish in Judge's mind that Sobel first provided a copy of the Agreement on July 3, 1996. Bureau Ex. 329, Tr. 313-314.[28] Bureau continues to conceal March 25, 1995 filing.

28. Sobel's testimony in Sobel proceeding was received in Kay as Bureau Ex. 329. The Bureau was represented in both proceeding by the same counsel.

e. *Bureau's Proposed Findings filed September 25, 1997.* Continued concealment of the filing of the Agreement on March 1995. Bureau also cast doubt on Sobel's testimony that the Agreement was to be supplied in Kay discovery and stressed filing by Sobel of Agreement in July 1996 in order to establish intentional deception. See paragraphs 55, 62, 90 94, 99, among others.

f. *Bureau Reply to Sobel's Findings filed October 21, 1997.* Continued concealment of March 1995 filing of Agreement.

g. *Bureau's Comments on Sobel's and Kay's Replies filed October 31, 1997.*[29] Bureau falsely claimed: "none of Sobel's or Kay's filings in 1994, or 1995 disclosed the relationship between Sobel and Kay with respect to the Management Agreement stations." Par. 4. No disclosure of the March 1995 filing. Bureau emphasized Sobel's failure to produce the management agreement until specifically directed to do so by the Commission in 1996. Par. 6. Paragraphs 4-10, the Bureau's treatment of "lack of candor" is designed to mislead Judge Frysiak in order to establish intentional deception.

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29. Sobel's proposed findings were limited to the transfer of control issue. Sobel and Kay's Replies dealt with the misrepresentation issue. Bureau then filed comments relating solely to Sobel and Kay's Replies. The Bureau's Comments, filed pursuant to the Judge's *Order*, FCC 97M-176, released October 24, 1997, clearly played a major role in Judge Frysiak's conclusion that Sobel intentionally concealed his business relationship with Kay.

Appendix I

The January 25, 1995 filing

170. On or about January 25, 1995, Brown and Schwaninger, acting on Kay's behalf, submitted in the above-captioned proceeding a pleading entitled "Motion to Enlarge, Change or Delete Issues." WTB Ex. 343. That pleading included the following statement:

> James A. Kay, Jr. is an individual. Marc Sobel is a different individual. Kay does not do business in the name of Marc Sobel or use Sobel's name in any way. . . . Kay has no interest in any of the licenses or stations held by Marc Sobel. Marc Sobel has no interest in any of the licenses or stations authorized to Kay or any business entity in which Kay holds an interest. Because Kay has no interest in any license or station in common with Marc Sobel and because Sobel was not named as party to the instant proceeding, the Commission should either change the [HDO] to delete the reference to the stations identified as stations 154 through 164 in Appendix A, or should dismiss the [HDO] with respect to those stations.

WTB Ex. 343 at pp. 4-5. This was the sole reference to Sobel in the entire sixteen page pleading that addressed numerous other matters. *Id.* Kay executed a general supporting affidavit whereby he "declare[d] under penalty of perjury . . . that the . . . Motion to Enlarge, Change, or Delete Issues is true and correct." *Id.* at p. 23. Kay explained that he scanned through the document and saw no obvious errors and therefore executed the affidavit that had been supplied to him by his

legal counsel. Tr. 1301. He did "not analyz[e] the meaning of every nuance of every word through it, not even close." Tr. 2443-2444.

171. Kay believes that when his attorneys wrote in the pleading that he had no "interest" in Sobel's licenses, they meant that "James Kay does not have a legal interest, an ownership interest, in the licenses held by Marc Sobel." Tr. 1301. Kay understood the language denying an interest in Sobel's licenses or stations to mean that Kay "had no ownership interest as in owning a part of this, being a partner, in any licenses that were issued to Marc Sobel."[30] Tr. 2444. Insofar as the pleading stated that Kay did not have an interest in any "license or station" authorized to Sobel, Kay has always used the two words (station and license) interchangeably, noting that FCC licenses are titled Radio Station License. Tr. 1314. He used the terms interchangeably and he believes Dennis Brown, who wrote the pleading, did also. Tr. 2444.

172. Kay was obviously aware of the management agreement at the time he executed the affidavit, but he also knew the management agreement had been prepared by the same attorneys who drafted the pleading and the affidavit. Tr. 2444. Kay was specifically advised, by counsel, that, in fact, that the management agreement did not constitute an interest. Tr. 2444-2445. In any event, there was not a great

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30. Kay's testimony is consistent with the testimony given by Kay and Sobel in the Sobel proceeding as to what they meant by the use of the word "interest." WTB Ex. 328, pp. 146-148; WTB Ex. 329, pp. 371-372.

correlation between the management agreement and the motion for which the affidavit was executed. One objective of the motion was to have stations licensed to Sobel removed from the HDO, but this was not its primary purpose and, indeed, only one paragraph in the sixteen page pleading was devoted to this matter. WTB Ex. 343. Moreover, most of the management agreement stations were not even affected by the HDO. Only two of the eleven Sobel call signs listed in Appendix A to the HDO were subject to the management agreement. Compare HDO, Appendix A, items 154-164, and WTB Ex. 341 pp. 1 & 837. The other nine stations included in the HDO had no connection to Kay whatsoever. *Id.* Conversely, fourteen out of the sixteen management agreement stations were **not** listed in the HDO. *Id.*

173. Kay and Sobel testified in this proceeding and answered questions put to them in a candid and forthright manner. Their testimony that they did not intend to deceive the Commission concerning their business dealings is entirely credible and is accepted.

174. Further, their testimony is buttressed by the evidence showing that Kay informed the Commission of their business relationship long before any questions were raised by the Bureau. Thus, on March 10, 1995, in response to the Bureau's First Set of Interrogatories, Kay informed the Bureau that "Kay manages stations which are authorized to Marc Sobel" and on March 24, 1995, Kay gave the Bureau a copy of the Management Agreement which fully spelled out their business arrangement. This was more than two years

before the Bureau first raised questions in its motion to enlarge filed April 3, 1997 in the Sobel's case.[31]

CONCLUSIONS

Section 308(b) Issue

175. This issue is "[t]o determine whether James A. Kay, Jr. has violated Section 308(b) of the Act and/or Section 1.17 of the Commission's Rules, by failing to provide information requested in his responses to Commission inquiries." *HDO* at ¶ 10(a). Section 308(b) of the Communications Act provides, in pertinent part:

> The Commission, at any time after the filing of [an] original application and during the term of any . . . license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such . . . statement of fact shall be signed by the applicant and/or licensee in any

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31. Significantly, one year earlier, March 6, 1996, the Bureau sought certification to remove Sobel's licenses from the Kay proceeding. Although, aware that "Kay manages stations which are authorized to Marc Sobel," Note 2, the Bureau's pleading does not indicate or even suggest that Kay or Sobel misrepresented facts or lacked candor. The Bureau first raised a question of the propriety of the January 21, 1995 filing, when it sought a misrepresentation issue against Sobel in April 1997 (more than a year after it was given a copy of the Management Agreement).

> manner or form, including by electronic means, as the Commission may prescribe by regulation.

47 U.S.C. § 308(b), Section 1.17 of the Commission's Rules and Regulation provides:

> The Commission or its representatives may, in writing, require from any applicant, permittee or licensee written statements of fact relevant to a determination whether an application should be granted or denied, or to a determination whether a license should be revoked, or to some other matter within the jurisdiction of the Commission. No applicant, permittee or licensee shall in any response to Commission correspondence or inquiry or in any application, pleading, report or any other written statement submitted to the Commission, make any misrepresentation or willful material omission bearing on any matter within the jurisdiction of the Commission.

47 C.F.R. § 1.17. For the reasons recited, *infra*, it is concluded that this issue is resolved in Kay's favor.

176. There is no suggestion by the Commission in the HDO that Kay made any false statement in his response to the 308(b) request and the Bureau did not seek any modification or enlargement of the issues to permit consideration of a misrepresentation issue. Further, there is not any record evidence to support such a contention. The issue as designated, is whether Kay violated his obligations under 308(b) "by failing to provide information requested in

his responses to Commission inquiries." HDO at ¶ 10(a). Accordingly, the Bureau's reliance in its Findings on *FCC v. WOKO, Inc.*, 329 U.S. 223 (1946); *RKO General, Inc. v. FCC*, 670 F.2d 215 (D.C. Cir. 1981); and *Trinity Broadcasting of Florida, Inc.*, 10 FCC Rcd 12020 (ALJ), which involve intentional misrepresentation and lack of candor, are misplaced.

177. While the Commission and its operating Bureaus have the unquestioned right to require its licensees to provide information necessary to accomplish the Commission's public interest responsibilities, there are limits. The point where an investigation exceeds permissible bounds was articulated in *Stahlman v. FCC*, 126 F.2d 123 (D.C. Cir 1942) where the Court said the Commission is not authorized "to require appellant or other witness whom it may summon to bare their records, relevant or irrelevant in the hope that something will turn up or to invade the privacy protected by the Fourth Amendment"[sic] *Id* at 128. While *Stahlman* involved a 403 investigation, the Court's admonition applies equally to 308(b) inquiries, such as that directed at Kay. The Bureau's 308(b) letter of inquiry to Kay exemplifies what is not permissible.

178. In each of the cases relied on by the Bureau, the 308(b) inquiry specifically informed the licensee of the conduct in question and the inquiry was narrowly focused to obtain the necessary information. Thus, in *Carol Music, Inc.*, 37 FCC 379 (1964), the 308(b) information sought concerned broadcasts in aid of illegal gambling. In *Warren L. Percival*, 8 FCC 2d 333 (1967), the Commission sought specific information concerning whether the licensee had been convicted of a crime. Also, the 308(b) inquiry in PTL of *Heritage Village Church*, 7 FCC 2d 324 (1979) was narrowly focused to specific fund raising matters under scrutiny.

179. Unlike these cases, a review of the 308(b) letter authored by W. Riley Hollingsworth[32] leads to the conclusion that the Bureau was engaged in a fishing expedition with the hope that something would turn up. Rather than explaining the nature of any particular inquiry, complaint, or alleged violation and asking for focused information, Kay was being asked to provide virtually every detail regarding the operation of his business. This included sensitive information such as his entire customer list[33] and details regarding the technical configuration of each of his customers' system (which raised serious concerns for safety to liability and financial

32. Hollingsworth was the author of the January 31, 1994 initial letter and all of the other pre-designation correspondence from the Bureau. Hollingsworth was at that time a deputy division chief within what was then the Private Radio Bureau. See Bureau Ex. 1.

33. Aside from the question whether there are loading requirements for all of the frequencies on which Kay operates, the request for loading information as of an arbitrary date is contrary to Commission policy. In its *Report and Order*, released August 31, 1992, the Commission made clear that it was not satisfied that the existing method of demonstrating loading on the basis of conditions existing at the time an application is filed produces the most reliable information. "A snapshot of loading at a single point in time may not necessary accurately reflect real system loading." The Commission changed the loading demonstration to the "average loading on the first business day of the month for each of the six months prior to the date on which the application requiring a showing of the loading is filed based on the business records of the SMR base station licensee." *Amendment of Part 90 of the Commission's Rules to Eliminate Separate Licensing of End Users of Specialized Mobile Radio Systems*, 7 FCC Rcd 5558, 5561 (1992). In this connection, Kay's lawyer complained about the loading methodology insisted on by Hollingsworth. Findings 19, *supra*. However, this complaint, as other requests for clarification and modification of the 308(b) request, were ignored.

exposure). In addition, as reflected in the correspondence exchanged between Hollingsworth and Brown's lawyer, all of Kay's reasonable requests for modification of the extremely broad inquiry were arbitrarily ignored by Hollingsworth without explanation. The Bureau had the burden of demonstrating that the information sought was relevant and was material to specific concerns raised about specific licensee operations of Kay and that it was not engaged in a fishing expedition with the hope that something would turn up. It did not do so. Neither Hollingsworth, the author of the 308(b) request or any other Bureau official was called on as a witness to justify the Bureau's inquiry. On the basis of the record, it is concluded that the initial request which was unlimited in scope, seeking information involving all of Kay's 152 licenses was arbitrary and unreasonable and that the Bureau's unwillingness to clarify and narrow the initial request so as to address specific concerns about specific licenses was equally wrong. Under the circumstances, Kay can not be faulted for raising legal objections and for failing to provide all the information sought. In this connection, the findings establish that Kay did not have the computer capability to provide the Bureau the information it sought. His actions can not be viewed as an act of defiance of the Commission's lawful authority and does not warrant a sanction.

180. There are additional reasons, detailed in the Findings, why no sanction is warranted. Briefly recited, unlike cases relied on by the Bureau, after the case was designated for hearing, in the course of discovery, Kay provided the Bureau with all of the information that had been

sought in the 308(b) Request.[34] In all, Kay turned over some 36,000 documents. In addition, the 308(b) request was received by Kay only two weeks after the Northridge earthquake, a devastating natural disaster that did substantial damage to his business and his personal residence. The earthquake directly affected Kay's literal and physical ability to respond to the 308(b) request.

181. Finally, a series of actions by the Bureau raised legitimate concerns in Kay's mind whether the data sought would be kept confidential. These actions, detailed in the Findings, consisted of: (a) the Bureau's extremely broad request, which it has been concluded, was arbitrary and unreasonable; (b) the Bureau's unreasonable unwillingness to narrow its request; (c) the Bureau's unwillingness to provide assurance consistent with Kay's past experience, that the information to be supplied would be held in strictest confidence and not disclosed to a person who is not a Commission employee;[35] (d) the Bureau's unexplained irrational demand for 50 copies of Kay's response; and (e) the circumstances surrounding the Bureau's denial of

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34. Subject to the proper exercise of his right to interpose and be heard on legal objections, Kay complied with all discovery demands made at hearing by the Bureau as modified by Judge Sippel. See *Memorandum Opinion and Order*, FCC 95M-77, released March 22, 1995.

35. The Bureau asserted that if Kay wished to have submitted material withheld from public inspection, he would be required to submit such a request concurrently with the submission of the material (see Finding 16), heightening Kay's concerns that his competitors would be able to obtain sensitive information through the Freedom of Information Act.

Kay's finders preference request. Accordingly, a fair review of the record adduced at hearing and the applicable precedent requires resolution of this issue in Kay's favor.

Construction and Operation Issue

182. This issue is "[t]o determine if Kay has willfully or repeatedly violated any of the Commission's construction and operation requirements in violation of Section 90.155, 90.157, 90.313, 90.623, 90.627, 90.631, and 90.633 of the Commission's Rules. *HDO* at ¶ 10(c). The reference to 90.627 of the Rules in no longer relevant to the Construction and Operation Issue. See *MO&O* 98M-94. The issue may be treated in two parts: (1) whether Kay failed to timely construct and/or permanently discontinued operation of one or more authorized stations; and (2) whether Kay violated applicable loading requirements. In either case, however, the focus of this issue is not simply whether Kay at some time or another failed to comply with one or more rule provisions, but whether he engaged in willful or repeated violation of the specific rules listed in the issue. It is concluded that the Bureau has failed to meet its burden of establishing that Kay engaged in willful or repeated violation of the specified Rules.

Timely Construction and/or Permanent Discontinuance

183. At all times and to the extent relevant to this issue, Section 90.155 required that conventional stations "must be placed in operation within eight (8) months from the date of grant or the authorization cancels automatically and must be

returned to the Commission." 47 C.F.R. § 90.155(a) (1994);[36] accord 47 C.F.R. § 90.633(c)-(d) (1994). Section 90.631(e) required that "licensees of trunked facilities must complete construction within one year." 47 C.F.R. § 90.631(e) (1994), and Section 90.631(f) provided for automatic cancellation if this construction deadline is not met: 47 C.F.R. § 90.631(f) (1994).

184. At all times and to the extent relevant to this case, Section 90.157 of the Rules provided:

> A station license shall cancel automatically upon permanent discontinuance of operations. Unless stated otherwise in this part or in a station authorization, for the purpose of this section, any station which has not operated for one year or more is considered to have been permanently discontinued.

47 C.F.R. § 90.157 (1994); accord 47 C.F.R. § 90.631(f) (1994) (specifying a shorter time for some 800 and 900 MHz trunked system licenses).

185. The parties have stipulated that, as to each site annotated as "Not in operation" in the "Comments" column of Attachment A to Kay's May 11, 1995, *Amended Responses*

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36. The regulatory provisions relied upon are as codified in the 1994 edition of the Code of Federal Regulations, revised as of October 1, 1994. There have been many amendments and revisions to the rules since *the HDO*, and, to the extent possible, references to the rules in this decision will be to the regulations in effect as of the release date of the *HDO*, *i.e.*, December 13, 1994.

to Wireless Telecommunications Bureau's First Set of Interrogatories (WTB Ex. 290), that facility was either not timely constructed or operation of that facility had been permanently discontinued as of May 11, 1995. Tr. 1232. The Bureau presented no evidence that any authorized facilities other than those specifically covered by this stipulation were not timely constructed or that operation of any such facilities has been permanently discontinued. Moreover, the Bureau has not demonstrated any improper conduct or motive in connection with the facilities specifically covered by the stipulation. Accordingly, the record does not support any adverse conclusion against Kay in this regard, nor does the record warrant any sanction other than that separately considered under the Automatic Cancellation Issue.

System Loading

186. The Bureau proposes adverse conclusions under the "loading" issue as to Kay's conventional channels. The rules relied on by the Bureau are Section 90.313 and 90.633.[37]

187. A review of the subject rules indicates that there are no loading "requirements" *per se* for conventional

37. The Bureau has not presented evidence and has not urged an adverse determination against Kay under the loading issue as to his trunked system. It is therefore not necessary to consider the applicability of Section 90.631 to the particular trunked systems licensed to Kay. In any event, the record shows that as of November, 1995, based solely on Kay's computer-maintained billing records, Kay's trunked SMR (YX) systems were loaded to well over the 70 mobile per channel standard required to retain the channels.

channels. It appears that loading on conventional channels becomes an issue only in specified application processing contexts. For example, an applicant for additional channels may, depending on the circumstances, be required to demonstrate that any existing systems licensed to him in the same area and in the same frequency band are loaded. *E.g.*, 47 C.F.R. §§ 90.313(c), 90.623(d), & 90.633(e). Thus, a determination of whether a conventional channel licensee has violated "loading" rules requires much more than a snapshot comparison of authorized mobile units versus current actual loading count. It requires, rather, a demonstration that an applicant filed a particular application that required loading which the applicant did not, at the time of the application, have. The Bureau has not so demonstrated.

188. In addition, as pointed out by Kay and not disputed by the Bureau, channels below 470 MHz are not assigned on an exclusive basis, regardless of loading, and are not subject to any sort of loading requirements. Accordingly, the Bureau's inclusion of Kay's stations operating below 470 MHz in its loading analysis[38] was improper and inapposite. As to Business Radio Service stations operating in the 470-512 MHz band, the Rule only prescribes a maximum loading limit, in that no more than 90 mobile units will be authorized on a given channel in a given service area. 47 C.F.R. § 90.313(a)(3) (1994). The Bureau has not demonstrated, or even alleged, that Kay exceeded the maximum loading level.

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38. WNQK532, WNQK959, WNXC713, WNZL447, WPBX246. WPBX247, and WPEE253. WTB PF&C at ¶¶ 48, 90-91, 94, 96-96, 99.

189. For 800 MHz Conventional SMR stations, the Rule indicates an existing licensee typically may only receive authorization for an additional channel in the same service area if loading on the existing channel is at least 70 units. 47 C.F.R. § 90.633(e) (1994). Section 90.633(a) specifies that loading requirements apply to the channel as a whole, not any one particular licensee. Accordingly, to determine whether an existing licensee is eligible for an additional channel it is necessary to examine the loading of all licensees sharing that channel, not simply the loading of the applicant.

190. The Bureau has not demonstrated that Kay ever submitted any application which triggered Section 90.633(c) of the rules for which he was not adequately loaded at the time. The Bureau instead complains about Kay's lack of historical loading records. The Bureau states: "[T]he record evidence demonstrates that Kay did not have the ability to accurately determine or report his loading to the Commission." WTB PF&C at ¶ 234. Elsewhere the Bureau asserts: "The evidence . . . indicates Kay did not have a means of accurately counting his loading to determine his eligibility. . . ." *Id.* at ¶ 216.[39] The record does not support the Bureau's assertion. As to any particular application as to which specific loading requirements might be applicable, Kay

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39. The Bureau went on to assert that Kay "avoided scrutiny of his loading by filing applications in the name of surrogates, and wholly owned corporations." *Id.* at ¶ 217. The Bureau is apparently referring to the applications it discusses under the Abuse of Process Issue. But in no case has the Bureau demonstrated, as to any one of these applications, that Kay was ineligible to apply for the same facilities in his own name, or that Kay's involvement with the application was concealed in any way from the Commission.

would have been able and willing to provide current loading information if the Commission requested it. For example, if the Commission had at any time requested the loading on a particular channel, Kay could first check his billing system, then examine his paper records, and, if necessary, collect relevant information from additional sources, *e.g.*, determining from dealers how many units are active on the system. However, to collect historical information on an across-the-board basis for more than 150 calls signs, many of them involving multiple channels and/or multiple base station sites, was a virtually impossible task. As earlier noted, the Bureau's request was an impermissible fishing expedition.

191. Further, even assuming, arguendo, that the Rules contained a loading requirement in non application processing situations, the Bureau's reliance on loading as of a specific date runs counter to Commission policy and is invalid as a measurement of Kay's system loading. As discussed, *supra*, the Commission has made clear that a snapshot of loading at a single point in time does not accurately reflect system loading. The Commission has adopted a standard requiring a showing of average loading over a six month period.[40] The Bureau has not offered such a showing, providing a further reason for rejecting its contention that Kay's "loading" was inadequate.

192. Moreover, in evaluating Kay's loading, the Bureau improperly limits its analysis solely and exclusively to Kay's computer billing records, even though the evidence shows

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40. See *Amendment of Part 90 of the Commission's Rules to Eliminate Separate Licensing of End Users of Specialized Mobile Radio Carriers*, 7 FCC Rcd 5558, 5561 (1992).

that they were not kept primarily for loading information and do not present a complete or accurate picture of the system loading.[41] The rules do not specify any particular form for loading records — indeed, the Commission does not expressly require loading records at all, but rather states that it will evaluate loading based on the licensees "business records." Kay's computerized billing records tell only part of the story. There are also the paper files for each customer which include more detailed information that will also be informative as to system loading.[42] Although these were among the 36,000 documents produced by Kay in discovery, the Bureau chooses instead to focus solely and exclusively on the computerized billing records. The Bureau can not

41. Kay explained at hearing the many reasons why the computer billing records will not give a full or accurate picture. For example, due to limitations in earlier versions of the billing software, a customer who has access to four mountain top repeaters might only show in the billing records as having access to two. *E.g.*, Tr. 1074-1075.

42. One example of how review of the customer's paper files (which are also part of Kay's business records and therefore may be used to establish loading) can be used to clarify specific questions is the situation with Yale Chase Materials Handling, a Kay repeater customer. When confronted with a specific question in a Bureau exhibit suggesting a possible discrepancy as to their number of mobiles, Kay was able to go to that specific customer file and resolve the matter. Tr. 2499-2503. Had the 308(b) Request asked Kay to justify loading for a specific station or even for a manageable group of stations, he could have engaged in a similar analysis and presented loading information supported by these customer records. But the 308(b) Request asked him for the complete loading of all his authorizations — without regard to whether they were subject to any loading requirements.

dictate which of Kay's business records will count for loading purposes and which do not.[43] The current rules by which the Bureau is bound do not specify what records will count and how they are to be maintained. It is therefore entirely inappropriate for the Bureau to limit its examination solely to business records that admittedly do not tell the full story.

193. In addition, the billing records did not include information about loaners and demo units, rental units, or the extensive use of Kay's system by other radio shops and dealers. The Bureau's objection that nothing other than the billing records may be considered because the billing records are what Kay produced when ordered by Judge Sippel to produce loading records. WTB PF&C at n.22, is without support. When he produced this information, Kay expressly disclosed these limitations, stating:

> Kay's records do not reflect Kay's own shop use, nor records of other users in other shops who used radios at no charge, and these records do not include rentals, demos and loaners, because none of these records resulted in customer billing for repeater services, even though use of the repeaters did occur.

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43. The Bureau disputes Kay's assertion that the 36,000 documents produced in discovery are essentially the same documents that would have been required to answer the 308(b) Request, retorting that the Bureau only sought a "list" of Kay's customers. WTB PF&C at ¶ 43. This is not true. The 308(b) Request sought a report of which customers were using which stations. Because of the limitations of Kay's billing system—which was neither designed nor used to maintain loading records for regulatory purposes—the paper files and other records would also have been required.

WTB Ex. 19 at p. 2.[44] Moreover, in addition to the billing information, Kay also produced 36,000 documents including his paper files for each repeater customer.

194. Unable to demonstrate that Kay lacked eligibility as to any particular application or that he was not properly loaded in the context of any application requiring it, the Bureau has attempted to come in the back door by arguing that Kay should have amended his authorizations to reflect changes in loading. The Bureau's contention is that at a number of Kay's stations, the billing records, as of 1995, in many cases reflect less units than are authorized for the system. According to the Bureau, Kay was required by Section 90.135(a)(5) of the Rules, as in effect at the time of designation, 47 C.F.R. § 90.135(a)(5) (1994), to amend the authorizations for these stations to reduce the number of authorized mobiles. WTB PF&C ¶¶ 231-238.

195. Initially, Section 90.135(a) was not specifically mentioned in the HDO and the issues against Kay did not include a violation of this rule. Moreover, the Bureau never sought to modify the issues to permit consideration of a violation of this rule. Contrary to the Bureau's assertion, the Bureau can not unilaterally modify the HDO by mentioning the rule in a prehearing "Statement of Readiness for Hearing." Consequently, since the alleged violation of Section 90.135(a)(5) of the Rules is beyond the scope of the HDO, it can not be considered.

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44. This was way back in 1995. The Bureau had more than ample opportunity to conduct further discovery to test these assertions, but chose not to do so. In this regard, the Bureau deposed Kay over a four day period and apparently, did not ask a single question about the use of radios at no charge.

196. Even assuming an alleged violation of Section 90.135(a)(5) was included among the many issues designated in this case, the Bureau's proof falls far short of establishing a violation. The Bureau's proof of an alleged violation consists of the billing records of March and/or November 1995. The Bureau offers no Commission precedent for the methodology it has employed. Aside from the deficiencies in relying solely on billing records, the Bureau's proof runs counter to the Commission's determination that a snapshot of loading at a single point in time does not accurately reflect system loading.

197. The rule itself does not indicate how soon a commercial operator must amend after a change in actual loading. In addition, a search of Commission precedent does not directly address the question. However, it is reasonable to assume that Section 90.135(a)(5) of the Rules does not require an immediate amendment each and every time there is a change in the loading on a station used to provide commercial service to public customers. It is to be expected that the actual loading for a commercial service provider (*i.e.*, a private carrier licensee in the 470-512 MHz band and/or an SMR licensee in the 800 MHz band) will fluctuate over any particular period of time. Surely, a reasonable interpretation of the rule allows for the normal ebb and flow of business.

198. It is precisely for these reasons that the Commission has rejected the snapshot approach employed here by the Bureau. The Commission has decided that the six months averaging method is a reliable loading indicator where an application requiring a showing of loading is required. In

the absence of evidence indicating the Commission has adopted a different standard in applying Section 90.135(a)(5), it is reasonable to use the same indicator which the Commission employs when an application for additional frequencies is filed. Thus, a showing that Kay has violated Section 90.135(a)(5) requires the Bureau to establish, with respect to each of Kay's authorizations, that the mobile count during a six month averaging period fell below the relevant level. The Bureau has not presented such evidence. Accordingly, for all the reasons set forth *supra*, the "loading" issue is resolved in favor of Kay.

Abuse of Process Issue

199. This issue is "[t]o determine whether James A Kay, Jr. has abused the Commission's processes by filing applications in multiple names in order to avoid compliance with the Commission's channel sharing and recovery provisions in violation of Section 90.623 and 90.629. HDO at ¶ 10(d). Section 90.629 is no longer at issue in this proceeding. See *MO&O* 98M-94. The Bureau has failed to meet its burden of showing that Kay was the real party in interest in any of these applications, and has not, in any event, demonstrated that Section 90.623 would have precluded Kay from submitting any one of the questioned applications in his own name. It is therefore concluded that the Bureau has failed to meet its burden of proof under the issue.

200. The Bureau asserts that Kay abused the Commission process "by submitting applications for end user licenses in the names of individuals who had no *bona fide* intention of using radios." WTB PF&C at ¶ 250. Specifically,

the Bureau claims: "Kay filed bogus end user applications in the names of Roy Jensen, Kevin Hessman, and Vincent Cordaro. While those applications represented that these individuals had businesses that required the use of radios, these individuals, who were employees of Kay, had no intention of using radios in these alleged businesses." *Id.* at 253. The Bureau's theory is that Kay did this as part of a scheme to "warehouse" spectrum so that he would have capacity to serve future users. *Id.* at ¶¶ 251-252.[45]

201. Contrary to the Bureau's assertions, the undisputed record establishes there is a factual basis for Kay's belief that each of these individuals either were engaged in or intended to engage in pursuits beyond the scope of their employment by Kay in which they desired to use Kay's radios and repeaters. See *Kay PF&C* at ¶¶ 95-97, 104, 115. In these circumstances, prior to October of 1992, it would have been unlawful for Kay to have permitted these individuals to operate radios on his system for their own outside pursuits unless such operations were licensed.

202. The credibility of the witnesses against Kay on this issue is also questionable for other reasons. Both Hessman and Jensen were found to have made misrepresentations

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45. The Bureau makes inconsistent arguments. Here, in furtherance of its charge of abuse of process, it asserts that Kay was in such dire need of excess capacity that he had to file bogus applications to make certain he would be able to serve users. Under the loading issue, however, the Bureau argues that Kay had dozens upon dozens of unloaded repeaters (and, hence, excess capacity). The Bureau can not have it both ways, and has not met its burden of proving either theory.

under oath before the Office of Appeals of the California Unemployment Insurance Appeals Board regarding the circumstances of their discharge from Kay's employ.[46] In addition, Cordaro tells inconsistent stories. At hearing he denied having obtained an authorization in pursuit of an independent business activity; but in 1992 he signed and submitted to the Commission a declaration, under penalty of perjury, attesting to the opposite. WTB Ex. 351 at pp. 2 & 5. Also, the evidence adduced indicates that Cordaro further misrepresented to the Bureau during the investigation, to Kay during discovery, and to the Presiding Judge and the Commission during the hearing regarding the facts and circumstances surrounding computer files he removed from Kay's system. All three of these men have reason to dislike Kay and are clearly biased against him. Their testimony is not credible and is not accepted.

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46. The Bureau's attempt to negate the findings that Jensen and Hessman misrepresented facts in their unemployment hearings by accusing Kay of similar misconduct is indefensible. The Bureau's claim that Kay's reason for firing Hessman was different than he testified to at the unemployment hearing (WTB PF&C at ¶ 262) is a distortion of the record. The Bureau has not offered a shred of support showing that the reasons relied upon by Kay at the unemployment hearing were not true. The fact that Kay also had another reason for wanting to discharge Hessman - the one he could not absolutely prove - does not make the reason on which he did rely untrue. Kay testified in this hearing as follows:

> [Hessman] very nicely gave me a justifiable firing by his actions, so he was fired *both* for what he did that I could not prove and for something he conveniently gave me that I could prove and did prove and I fired him.

Tr. 1294. *Emphasis supplied.*

203. There is also reason to question the reliability, if not the credibility, of Carla Pfeifer. She purports to have vague and incomplete recollections about events that allegedly occurred ten plus years ago. She questions whether her signature on various documents is genuine, even though (a) the documents were all in her possession until such time as they were turned over to FCC investigators, and (b) she has no idea of who might have signed them. She acknowledged that she acquired the station as a business opportunity, but then she claims to have agreed to assign the license without any information or understanding of what the terms of the assignment were to be; indeed, she was not even aware until she was cross-examined at the hearing that the assignment had in fact been granted years ago. Ms. Pfeifer's testimony is certainly not adequate to sustain the Bureau's burden of proof. The Bureau has failed, in any event, to show that Kay would have had any motive for using Pfeifer as an application shill. See, paragraph 207 below.

204. Significantly, the Bureau is charging Kay with preparing and filing false applications, but in many cases it has not even placed copies of the applications in evidence. In the cases of Jensen and Cordaro, for example, the Bureau offered only copies of the resulting licenses, but Kay forthrightly admitted that he probably prepared or assisted in the preparation of the applications. There is no evidence that Kay in any way concealed his involvement. In the Roy Jensen end user application, for example, Kay's name and the call sign of Kay's associated station were handwritten (most likely by Kay) on the application. WTB Ex. 306 at p. 3. And the contact phone number provided at two different

places on the application is a business number that rings at Kay's offices. WTB Ex. 306 at p. 1.

205. The Bureau further charges that Kay abused Commission process "by using the names of other to apply for additional frequencies for himself." WTB PF&C at ¶ 254. In this connection the Bureau is referring principally to the base station licenses held by Carla Pfeifer, Vincent Cordaro, Jerry Gales, and Marc Sobel. As the Bureau correctly notes, "it is an abuse of process to specify a surrogate to apply for a station so as to deny the Commission and the public the opportunity to review and pass on the qualifications of that party." *Id.*, *quoting Trinity Broadcasting of Florida, Inc.*, 10 FCC Rcd 12020, 12060 (ALJ 1999). But the Bureau has not met its burden of proving that Kay did any such thing. The Bureau has presented absolutely no evidence or other showing that Kay was ineligible to hold the licenses in question, and the Bureau has offered no evidence showing that Kay in any way acted to conceal his involvement in the applications; indeed, in many instances Kay's name and telephone number was provided in the applications as the contact person and the one who prepared the application.

206. Kay explicitly testified that he could have easily applied, in his own name, for the Castro Peak license held by Carla Pfeifer had he so desired, Tr. 2432-2433, and the Bureau has not contradicted this. The record indicates that most, if not all, of the management agreement station licenses held by Marc Sobel were, at the time he obtained them, on encumbered channels. *E.g.*, WTB Ex. 229 at pp. 198-199. The Bureau has not disputed this. Kay demonstrated that, if he had desired to apply in his own name for the Rasnow Peak authorization held by Cordaro, he would have been able

to do so by simply demonstrating a need for only 9 mobile units, based on an analysis of the loading environment on the channel at that time. Tr. 2479-2483. The Bureau has not disputed this.[47] In this connection, the record establishes Kay's adeptness at obtaining licenses on encumbered channels in his own name in circumstances where there were existing users already on the channel. *E.g.*, Kay PF&C at ¶ 93.

207. Abuse of process, especially the particular manifestation of it alleged here, is a very serious charge. It can not be supported by mere speculation. It was incumbent upon the Bureau to prove that Kay did the acts it alleges. The Bureau can not even make out a case that Kay had any motive to do the things alleged. It has not demonstrated that Section 90.623 would have precluded Kay from submitting any one of the questioned applications in his own name. Accordingly, since the Bureau has not satisfied its evidentiary burdens, the issue is resolved in Kay's favor.

Malicious Interference Issue

208. This issue is "[t]o determine whether James A. Kay, Jr. willfully or maliciously interfered with the radio communications of other systems, in violation of Sections

47. Official notice is taken of the fact that the authorization held by Jerry Gales, Call Sign WPFF295 at Heaps Peak is co-channel to and short-spaced with Trunked SMR Station WNPJ874 operated by Kay at Mount Lukens. Heaps Peak, being only 65 miles from Mount Lukens, is well within the 105 mile protection area for Station WNPJ874. Accordingly, there would have been no need for Kay to have used Jerry Gales as a shill if he wanted to apply for this channel in his own name at Heaps Peak.

333 of the Act." *HDO* at ¶ 10(e). The Bureau has recommended resolution of this issue in Kay's favor. It is therefore not necessary to address the matter further.

Effect of De Facto Control Issue

209. The issue as framed by Judge Sippel seeks to determine "[w]hether based upon the findings and conclusions reached in WT Docket No. 97-56 concerning Kay's participation in an unauthorized transfer of control Kay is basically qualified to be a Commission license."[48] It is concluded that such findings and conclusions do not render Kay unfit to be a Commission licensee.

210. As discussed in Findings 168 and 169, the Sobel conclusion that Sobel was unfit to be a licensee was tainted by the fact that the Bureau deliberately concealed the fact that Kay provided to the Bureau a copy of the Management Agreement in March 1995. The Bureau did more than conceal this critical information. It falsely stated in its October 31, 1997 Comments to Kay's and Sobel's pleadings relating to the misrepresentation issue that "none of Sobel's or Kay's

48. The issue as framed by Judge Sippel does not permit the Presiding Judge in this case to make independent findings as to whether the Management Agreement between Sobel and Kay constituted an unauthorized transfer of control. However, it should be noted that in determining whether management agreements executed by SMRs constitute a transfer of control, the Commission does not use the six-prong test of control spelled out in *Intermountain Microwave*, 24 RR 983 (1983). See *Third Report and Order*, 9 FCC Rcd 7988, 8095-8096, note 434 (1994) comparing *Intermountain* and test used in *Application of Motorola, Inc.*, File No. 507505, *Order*, para. 14 (July 30 1985).

filings in 1994, or 1995 disclosed the relationship between Sobel and Kay with respect to the Management Agreement stations." Par. 4.[49] Thus, Judge Frysiak erroneously assumed that the Bureau first obtained a copy of the Management Agreement in July 1996, in response to a letter of inquiry to Sobel. See Judge Frysiak's *Initial Decision*, 12 FCC Rcd at 22902, para. 74, 77. There is no doubt that his ultimate conclusion that Sobel "made misrepresentations and lacked candor about the transfer of control" (para. 78) was based on his erroneous assumption as to when the Agreement was given to the Bureau. In light of these considerations, Judge Frysiak's conclusion must be disregarded in determining Kay's fitness to be a licensee.

211. An unauthorized transfer of control, in and of itself, is not grounds for disqualification unless coupled with an intent to deceive or other disqualifying conduct. *E.g.*, *Deer Lodge Broadcasting, Inc.*, 86 FCC 2d 1066, 49 Rad. Reg. 2d (P&F) 1317 at ¶¶ 63-67 (1981); *Blue Ribbon Broadcasting, Inc.*, 90 FCC 2d 1023, 51 Rad. Reg. 2d (P&F) 1474 at ¶¶ 7-9 (Rev. Bd. 1982); *Silver Star Communications - Albany, Inc.*, 3 F.C.C.R. 6342 at ¶¶ 52-58 (Rev. Bd. 1988), *aff'd* 6 F.C.C.R. 6905, 70 Rad Reg. 2d (P&F) 18 at ¶¶ 13-20 (1991); *Roy M. Speer*, 11 F.C.C.R. 18393 at ¶ 88 (1996). While this principle evolved in broadcast cases, it applies equally in the wireless services. *Brian L. O'Neill*, 6 F.C.C.R. 2572, 69 Rad. Reg. 2d (P&F) 129 at ¶30 (1991); *Century Cellunet of*

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49. This Judge has never seen prosecutorial misconduct of this magnitude in the twenty years he has presided over Commission cases. Such misconduct can not be countenanced. It is completely contrary to the Commission's duty and responsibility to treat all its licensees in a fair and evenhanded manner.

Jackson MSA Limited Partnership, 6 F.C.C.R. 6150, 70 Rad. Reg. 2d (P&F) 214 at ¶ 8 (1991); *Catherine L. Waddill*, 8 FCC 2710, 72 Rad. Reg. 2d (P&F) 500 at ¶ 19 (1993); *Applications of Motorola, Inc., supra.*

212. The Commission's usual response to unauthorized transfers is to require them to be undone. *E.g., Ellis Thompson*, 3 F.C.C.R. 3962 (Mob. Serv. Div. 1988) (cellular application granted conditioned on removal from an agreement a paragraph potentially conferring control on a third party), *affirmed on recon.*, 4 F.C.C.R. 2599 (Com. Car. Bur. 1989), *affirmed on review sub nom. Ellis Thompson Corp.*, 7 F.C.C.R. 3932 (1992), *reversed on other grounds sub nom. Telephone and Data Systems, Inc. v. FCC*, 19 F.3d 42 (D.C. Cir 1994); *Petroleum v. Nasby Corp.*, 10 F.C.C.R. 6029 (Rev. Bd. 1995) *recon. granted in part*, 10 F.C.C.R. 9964 (Rev. Bd. 1995) (renewal and belated approval of an unauthorized transfer of control issued subject to a divestiture condition), *remanded on other grounds* 11 F.C.C.R. 3494 (1996). When a sanction has been imposed, it is typically a forfeiture, not license revocation. *E.g., Rasa Communications Corp.*, 11 F.C.C.R. 13243 (1996); *Kenneth B. Ulbricht* (DA 96-2193; released December 31, 1996); *Galesburg Broadcasting Co.*, 6 F.C.C.R. 2210 (1991); *The Hinton Telephone Co.*, 6 F.C.C.R. 7002 (1991), *forfeiture reduced*, 7 F.C.C.R. 6643 (1992). See also, *Forfeiture Policy Statement*, 12 F.C.C.R. 17087 (1997).

213. Turning to the facts of this case, as discussed in the Findings, the written management agreement was prepared for Kay and Sobel by Washington, D.C. communications counsel, and both individuals were

specifically advised that it complied with applicable FCC requirements. Moreover, there is no evidence of an intent to conceal the business arrangement from the Commission. The Agreement was voluntarily given to the Bureau in March 1995, long before the Bureau raised any questions about its propriety. Therefore, consistent with Commission precedent, even if it is ultimately concluded that the Agreement constitutes an unauthorized transfer of *de facto* control of Sobel's stations to Kay, the transgression is not grounds for disqualification. In addition, a requirement to undo the Agreement is not necessary since the Agreement is no longer in effect, having been replaced by a revised agreement drafted by Kay's current regulatory counsel. Further, the assessment of a forfeiture would appear to be precluded by the statute of limitation. See Section 503(b)(6)(B) of the Act and Section 1.80(c)(3) of the Rules which provide that no forfeiture penalty shall be imposed if the violation occurred more than one year prior to the issuance of the appropriate notice. However, even if this was not the case, a forfeiture would not be warranted considering the complete absence of an intent to conceal the Agreement, Kay having given the Bureau, in good faith, a copy of the agreement in March 1995. If the Bureau found the Agreement wanting, it should have timely notified Kay and Sobel of that fact, instead of waiting more than a year and designating Sobel's applications for hearing on the pretext that the agreement was first filed in July 1996. Under the circumstances, no sanctions are warranted.

Appendix 1

Misrepresentation and Lack of Candor Issue

214. The issue added by Judge Sippel seeks a determination whether Kay "misrepresented facts or lacked candor in presenting a Motion to Enlarge, Change, Or Delete Issues that was filed by Kay on January 12, 1995 and January 25, 1995." As previously documented Judge Sippel's action stemmed from Judge Frysiak's erroneous conclusion that Sobel intentionally concealed the Management Agreement until compelled to disclose it in July 1996, pursuant to a letter of inquiry. It is concluded that the issue, contrived by the Bureau, is without substance. The issue is resolved in favor of Kay.

215. The issue concerns a brief statement made in a 16 page pleading filed in January 1995, that Kay had no "interest" in Sobel's stations or licenses. The Bureau contends that the statement was intended to deceive the Commission about his business arrangement with Sobel. The Bureau's argument rests on the false premise that Sobel and Kay concealed their Management Agreement until Sobel responded to a letter of inquiry in July 1996. The Bureau's contention is baseless. Initially, as discussed in the Findings, the statement was intended to correct an error in the original HDO that Kay was conducting business under a number of names including Marc Sobel dba Airwave Communications. The HDO did not state that the Commission was inquiring into the relationship between Sobel and Kay, but rather its erroneous belief that Sobel was a fictitious name being used by Kay. The statement in issue must be fairly understood in that context.

216. Moreover, the record makes clear that Kay understood the language in the statement prepared by his counsel denying an interest in Sobel's licenses or stations to mean that Kay "had no ownership interest as in owning a part of this, being a partner, in any licenses that were issued to Marc Sobel." Tr. 2444. Kay did not consider his provision of equipment and services in connection with a managed station to give him an interest in that station license, any more than he considers his provision of equipment and services to a community repeater to give him an interest in the licenses held by the users of the community repeater. Tr. 937-939. Kay's testimony as to what he meant by the word "interest" and the phrase "stations or licenses" is entirely reasonable and credible. Significantly, the Bureau shared the same view when in March 1996, it, like Kay earlier, sought to sever the Sobel licenses from the Kay proceeding, although it was aware that "Kay manages stations which are authorized to Marc Sobel." See "Wireless Telecommunication's Bureau's Request For Certification" filed March 6, 1996, note 2.

217. Further, the actions of Sobel and Kay are inconsistent with an intent on their part to conceal the management agreement from the Commission. The Bureau's speculation can not be reconciled with the fact that only two months after the January 1995 pleading, in March 1995, long before the Bureau first raised questions about the Management Agreement and the January 1995 pleading, Kay produced copies of agreements for stations he managed, including the Sobel Management Agreement. *Kay's Responses to Wireless Telecommunications Bureau's First Request for Documents* (March 24, 1995). Bereft of its false

premise that the Agreement was first filed in July 1996, the Bureau now speculates that Kay would not have produced the Sobel Management Agreement if the January 1995 pleading had been successful. The facts, however, do not support this speculation. The Bureau ignores the fact that Kay managed other stations besides Sobel's. In the March 1995 discovery response, in addition to the Sobel Management Agreement, Kay produced other management agreements that had no relevance to the January 1995 pleading and were not expressly implicated in the *HDO*. For example, it was by virtue of this discovery production that the Bureau received a copy of the management agreement between Kay and Jerry Gales. Bureau Ex. 326.

218. The *sine qua non* of disqualifying misrepresentation or lack of candor is a fraudulent or deceptive intent. *Leflore Broadcasting v. FCC*, 636 F.2d 454, 461 (D.C. Cir. 1980); *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1196, 59 Rad Reg. 2d (P&F) 801 (1986); *Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129, 53 Rd. Reg. 2d (P&F) 44 (1983). The Bureau has not offered even a shred of evidence that Kay and Sobel intended to deceive the Commission about their management agreement. On the contrary, the record shows that Kay and Sobel have been open and straightforward with the Commission. The misrepresentation issue is resolved in favor of Kay.

Automatic Cancellation Issue

219. The HDO also calls for a determination as to whether any of Kay's licenses have automatically cancelled as a result of certain rule violations (issue h).

220. The Bureau lists a number of UHF repeaters which Kay has admitted are not in operation. WTB PF&C at ¶ 107. However, Kay notes it is not the entire station authorized under the call sign that is not in operation, but only certain parts thereof. As noted by Kay, a single authorization may, in addition to one or more base station locations, also authorize control stations, mobile and talk-around authority, etc. Further, in reviewing the list set forth by the Bureau in paragraph 107 of its proposed findings, the vast majority of the locations listed are designated as Signal Hill. In April 1994, he points out that he submitted an application to modify a large number of his UHF authorizations, and part of that proposal was to delete all the base stations authorized at Signal Hill. That application is still pending before the Bureau to this day, more than five years later. See Kay Ex. 65; Tr. 2383-2394. Of the remaining listed locations, Kay asserts that reference to the authorizations themselves will reveal that the vast majority of these are control stations, not base stations. As such, according to Kay, they are not subject to construction deadlines, and the maintenance of that particular portion of an authorization does not have any preclusive effect on other licensees and applicants. Kay also states that most if not all of these items would be deleted if long-pending modification applications are granted.[50]

221. Similarly, the Bureau lists a number of 800 MHz stations which Kay has admitted are not in operation. WTB PF&C at ¶ 108. Kay claims that reference to the authorizations in question will reveal that each of these is a

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50. According to Kay, in many, if not most, of these instances, the situations exist only because the Bureau is maintaining a five year old freeze on the processing of any of Kay's applications.

secondary base station site. Kay points out that at 800 MHz, a licensee may be authorized for both primary and secondary locations on the same authorization. While primary sites are subject to applicable construction deadlines, secondary sites are not subject to construction deadlines and are not protected from interference.[51] Thus, as Kay indicates, automatic cancellation of authority for a secondary site would have no significant regulatory effect as a practical matter, because the site could be added back to the authorization at any time, subject to the restrictions applicable to all secondary sites.

222. The Bureau has suggested that "[t]he Presiding Judge may simply wish to conclude [certain] base stations were either not constructed or [permanently] discontinued operation . . . and direct the Commission licensing staff to perform the appropriate licensing maintenance." WTB PF&C at n. 23. This appears to be consistent with Kay's offer "to cooperate with the Bureau, after the hearing, to determine which authorizations, if any, should be purged from the Commission's database as a result of this stipulation." Kay PF&C at n. 27. The parties seem to be in agreement, therefore, that this is an administrative housekeeping chore that can be better accomplished on an informal basis in a post-hearing context. However, in light of the significant questions raised by Kay, it is imperative that the Bureau staff coordinate this matter with Kay, *i.e.*, this should be a joint and cooperative determination, not a unilateral determination of the Bureau staff. The Commission staff, of course, will ultimately make the determination and act accordingly, but it would be an

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51. See, *e.g.*, *Sharon Mutter*, 4 FCC Rcd 2654 at n. 18 & n.19 (PRB 1989); *Environmental Exploration Corp.*, 4 FCC Rcd 2651 at n 16 n. 17 (PRB 1989).

inefficient use of public and private resources to have the Bureau act unilaterally only to have Kay then seek reconsideration of one or more of its determinations and action. Therefore, the Bureau is directed to coordinate this matter with Kay before cancelling any of Kay's authorizations. In addition, in light of the determination, *below*, that Kay is qualified to remain a licensee, it is time to lift the five year old freeze on the processing of Kay's applications and the Bureau is directed to do so expeditiously.

223. Finally, all issues having been resolved in favor of Kay, it is ultimately concluded that Kay is qualified to remain a licensee. Further, there is no basis for license revocation of any of his stations or imposition of a forfeiture.

Accordingly, IT IS ORDERED, that unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules,[52] the licenses of James A. Kay, Jr., holder of One Hundred Fifty Two Part 90 Licenses in the Los Angeles, California, area ARE NOT REVOKED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph Chachkin
Administrative Law Judge

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52. In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d) of the Rules.

APPENDIX J — INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOHN M. FRYSIAK OF THE FEDERAL COMMUNICATIONS COMMISSION RELEASED NOVEMBER 28, 1997

Before the
Federal Communications Commission
Washington, D.C. 20554

WT Docket No. 97-56

In the matter of

MARC SOBEL

Applicant for Certain Part 90 Authorizations in the Los Angeles Area and Requestor of Certain Finder's Preferences

MARC SOBEL AND MARC SOBEL
d/b/a AIR WAVE COMMUNICATIONS

Licensee of Certain Part 90 Stations in the Los Angeles Area

APPEARANCES

Robert J. Keller, Esq. and *Scott A. Fenske, Esq.* on behalf of Marc Sobel; and *John J. Schauble, Esq.* and *William H. Knowles-Kellett, Esq.* on behalf of the Wireless Telecommunications Bureau, Federal Communications Commission.

Appendix J

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOHN M. FRYSIAK

Issued: November 24, 1997 Released: November 28, 1997

Preliminary Statement

1. By Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture, 12 FCC Rcd 3298 (1997) (HDO), the Commission instituted a revocation proceeding against the following licenses held in the name of Marc D. Sobel (Sobel): KAC8275 (GMRS), KD53189 (Business), KNBT299 (Conventional SMR), KRU576 (Conventional SMR), WIH718 (Business). WIJ516 (Business), WIJ698 (Business), WIJ716 (Business), WIK548 (Business), WIK657 (Business), WIK833 (Business), WIL516 (Business), WIL598 (Business), WNPX844 (Business), WNPY680 (Conventional SMR). WNWB334 (Conventional SMR), WNXL471 (Conventional SMR), WNYR424 (Conventional SMR), WNZC764 (Business), WNZJ445 (Business), WNZS492 (Conventional SMR), WPAD685 (Conventional SMR), WPCA891 (Conventional SMR), WPCZ354 (Conventional SMR), WPDB603 (Conventional SMR), WPFF529 (Conventional SMR), WPFH460 (Conventional SMR), and WPCG780 (Conventional SMR). The Commission also designated for hearing the following pending applications filed by Sobel:

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File No.	Date File	Call Sign	Frequency	Service	Type
670861	6/9/94	KKT934	851.8875	Conventional SMR	Assignment
415367	4/18/94	———	507.2875	Business	New
697577	3/22/95	WPAD695 852.4125	852.1625	Trunked SMR	Modification
416021	7/31/9	———	472.4125	Business	New
154618	5/16/95	———	463.6750	Business	New
501542	4/17/95	WPCZ354	853.1375	Conventional SMR	Reinstate
666673	5/6/94	WNWB334	854.0375	Conventional SMR	Modification
415478	9/16/94	———	471.9375	Business	New
614567	11/13/92	WNZS492	854.0875	Conventional SMR	Modification
R28310	12/15/94	WIJ716	471.8375 474.8375	Business	Renewal

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File No.	Date File	Call Sign	Frequency	Service	Type
R28311	12/15/94	KD53189	465.7375 468.7375 468.6125 463.4875 463.6125 468.5375 463.5375	Business	Renewal
D024171	2/20/96	WIK833	471.5125 474.5125	Business	Assignment
	1/24/96	WIK833	471.5125 474.5125	Business	Renewal

The Commission also held in abeyance five finder's preference requests filed by Sobel.

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2. The Commission designated the following issues for resolution in this proceeding:

(a) To determine whether Marc Sobel and/or Marc Sobel d/b/a Air Wave Communications have willfully and/or repeatedly violated Sec. 310(d) of the Communications Act of 1934, as amended, by engaging in unauthorized transfers of control of their respective stations to James A. Kay, Jr.;

(b) To determine, in light of the evidence adduced pursuant to the foregoing issue, whether Marc Sobel and/or Marc Sobel d/b/a Air Wave Communications are qualified to be and remain Commission licensees;

(c) To determine whether the above-captioned applications filed by Marc Sobel and/or Marc Sobel d/b/a Air Wave Communications should be granted;

3. The HDO placed the burden of the introduction of evidence and the burden of proof on the Wireless Telecommunications Bureau (WTB) with respect to issues (a), (b), and (d). The burden of the introduction of evidence and the burden of proof on issue (c) was placed with Sobel. The HDO also directed the Presiding Judge to determine whether a forfeiture should be issued against Sobel for willful and repeated violations of Sec. 310(d) of the Communications Act.

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4. By Memorandum Opinion and Order, FCC 97M-43 (released March 24, 1997), the Presiding Judge granted the "Petition to Intervene" filed by James A. Kay, Jr. (Kay) and named Kay a party to the proceeding.

5. By Memorandum Opinion and Order, FCC 97M-82 (released May 8, 1997), the Presiding Judge added the following issues against Sobel:

(a) To determine whether Marc Sobel misrepresented material facts or lacked candor in his affidavit of January 24, 1995.

(b) To determine based upon the evidence adduced pursuant to the foregoing issues, whether Marc Sobel is basically qualified to be and remand a Commission licensee.

The burdens of proceeding and of proof under those issues were placed on the WTB.

6. Hearings on all the issues were held in Washington, D.C. on July 29 and 30, 1997. The record in this proceeding was closed on July 30, 1997. Tr. 377. Proposed findings were filed by the WTB and Sobel on September 25, 1997. Replies were filed on October 21, 1997 by all the parties hereto.

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Findings of Fact

A. Transfer of Control Issue

Sobel's Relationship with Kay

7. Sobel has been involved in the land mobile radio business in the Los Angeles area for approximately 20 years. In that capacity he operates and maintains UHF (450 MHz and 470-512 MHz) repeaters on which he sells service to various business users; installs, maintains, and repairs repeaters and radio systems for other land mobile radio licensees; and provides consulting services on the design and operation of such radio systems. He is also an authorized mobile radio equipment dealer for several vendors, selling and leasing mobile radio equipment to repeater licensees and end users.

8. James A. Kay, Jr. (Kay) began operating a radio/ television repair service in 1972 or 1973. Tr. 325. He started providing repeater service on a commercial basis in the early 1980s. Id. Kay holds approximately 152 licenses from the FCC, of which approximately 50 licenses are in the 800 MHz band. Tr. 329-330. He has approximately seventy-five repeaters in the 800 MHz band that are licensed to him, and he also manages around 25 to 30 additional 800 MHz repeaters that are licensed to other entities. Tr. 330. Kay does business under the name Lucky's Two-Way Radios, which provides repeater service and does some site rental business. Tr. 333-334. Kay is the sole stockholder and president of Buddy Corp., which does business under the fictitious business name of Southland Communications. Tr. 334.

Southland provides sales, service, and installation of two-way radios. Id.

9. Sobel has known Kay for about 20 years. Tr. 71, 326. They first met when Sobel was working at Sandy's Electronics and Kay was a customer there. Id. Kay and Sobel were both active in Citizens Band radios in the 1970s (Tr. 326), and they have been friends since the 1970s. Tr. 71, 326-327. They have repaired equipment, shared leases, and helped each other for more than a decade. Tr. 327. Since the mid-to-late 1980s, Sobel has installed, maintained and serviced Kay's repeaters as a contractor paid by Kay. Tr. 72, 106, 327. Sobel repairs and maintains approximately 350 stations that Kay currently owns or manages. Tr. 105. Sobel has had the first call to repair, maintain, and install Kay's stations (Tr. 105), except for three sites where another contractor is located much closer to the sites than Sobel. Tr. 105, 328. Kay generally turns to Sobel when there is a difficult and complicated technical problem that Kay will not handle himself. Tr. 328. Kay will also ask Sobel to contact a potential customer to solve a troubling problem that Kay's regular staff is unable to solve. Tr. 327. Sobel might perform that service as often as twice a month. Tr. 72, 328. On occasion, Sobel will also contact someone on Kay's behalf to determine whether they are still operating a station. Tr. 72. If they were not operating, Sobel will help Kay get the license cancelled. Id. If the licensee was operating, Sobel would attempt to convince the licensee to change over to Mr. Kay's system. Tr. 72-73.

10. During the period October 1990 to April 1997 Sobel billed Kay for approximately 3,360 hours of work that he

performed for Kay. Kay receives the lowest rate Sobel charges because of the large amount of work Sobel performs for Kay. WTB Ex. 25, Tr. 245-246.

Agreement Regarding Sobel's 800 MHz Repeaters

Background

11. In the early 1990s, Sobel became interested in holding 800 MHz licenses himself. Tr. 73. Sobel asked Kay if he would help Sobel get involved in 800 MHz licenses. Id. Sobel approached Kay for assistance because he knew Kay had 800 MHz stations that were making money. Tr. 183-184. Kay agreed to help. Tr. 73. While Sobel believes he could have prepared the applications himself, he relied on Kay to prepare the applications because Kay had the software and additional knowledge needed to prepare the applications, and because it was more convenient to have Kay prepare the applications. Tr. 184.

12. Around the time the first 800 MHz station in Sobel's name was being constructed in the early 1990s, Sobel and Kay reached an oral agreement under which Kay would provide the equipment and money needed to construct and to operate Sobel's 800 MHz repearer stations, manage and market those stations, and pay all the operating expenses. Tr. 103-104. In return, Kay would receive the first $600 of revenue each month from each station, and the revenue over and above that would be split equally between Kay and Sobel. Tr. 104. Sobel did not have the disposable funds to invest in 800 MHz at the time he obtained the licenses. Tr. 187. Sobel did not have the option of going into 800 MHz on his own.

Id. Sobel estimated that it would cost $500 to $600 a month to lease a repeater site and the equipment needed for the repeater, install, maintain and repair the equipment, and obtain insurance. Tr. 104.

13. Under the oral agreement, Sobel was to be the person responsible for maintaining, repairing, and installing Sobel's 800 MHz stations. Id. Sobel performed most of the actual construction and installation. Tr. 107. Sobel performed that work as a contractor for Kay, and he was paid an hourly fee by Kay for that work. Tr. 106-108. Sobel cannot distinguish based upon his invoices what work he has done on Sobel's 800 MHz stations and what work relates to Kay's stations. Tr. 116, 243. Kay selected and purchased the equipment needed to construct the stations. Tr. 107, 351, 353. Kay did not keep track of which equipment went to stations licensed to him and which equipment went to Sobel's 800 MHz stations (or other stations he managed). Tr. 354.

14. At some point between the time Kay and Sobel entered into their original oral agreement and the time they entered into a written management agreement, they orally agreed that Kay would have an option to purchase Sobel's 800 MHz stations for $500 each. Tr. 108. Kay asked for the option because he needed to protect himself since his customers were on Sobel's stations. Tr. 365-366.

15. At some point in late September or October 1994, in response to a Freedom of Information Act (FOIA) request, Kay received a draft hearing designation order relating to his qualifications to be a Commission licensee. Tr. 261. Kay informed Sobel that the draft order contained the following

language (or substantially similar language).[1] "Information available to the Commission also indicates that James A. Kay, Jr. may have conducted business under a number of names. Kay could use multiple names to thwart our channel sharing and recovery provisions. We believe these names include . . . AirWave Communications and Marc Sobel, d/b/a AirWave Communications." Tr. 259, 262.

16. Based on the language in the draft hearing designation order, and because of Kay's problems with the FCC and his knowledge that parties had complained about the relationship between Sobel and Kay, Sobel asked Kay to have their oral agreement reduced to writing. Tr. 108-109, 262. On October 28, 1994, Kay and Sobel executed a "Radio System Management and Marketing Agreement." WTB Ex. 38, Tr. 108. The agreement was prepared by Brown & Schwaninger, a law firm representing both Kay and Sobel. Tr. 109.

17. Under Paragraph VII A. of the management agreement, Kay was required to pay Sobel an option fee of $100 as consideration for the option to purchase Sobel's 800 MHz stations. WTB Ex. 38, P. 4, Tr. 111. Kay initially forgot to pay the option fee. Tr. 111. In addition, the agreement had some clerical errors, and some stations were omitted from the agreement. Tr. 110-111. Kay and Sobel entered into a new written agreement to allow Kay to pay the $100, thus making the option binding, and to make the corrections to the agreement. Id. WTB Exs. 39 and 40, which are the December 30, 1994 agreement and an addendum, constitute

1. The quoted language is from the actual order designating Kay's licenses for hearing. Tr. 258-259.

the written agreement between Kay and Sobel concerning Sobel's 800 MHz Repeater stations. Tr. 112. There are no other written agreements between Kay and Sobel concerning Sobel's 800 MHz stations (hereinafter referred as the "Management Agreement Stations"). Tr. 361.

18. The agreement is effective for ten years. WTB Ex. 39, P. 6. The agreement automatically renews for five consecutive ten year periods unless Kay alone gives notice to the contrary at least ninety days prior to the end of the term. Id. Sobel has no right to prevent the agreement from automatically renewing. Id.

19. Paragraph III of the Management Agreement provides:

> Agent [Kay] shall be the sole and exclusive supplier of all equipment and labor required to maintain and repair the Stations' facilities, employing Agent's reasonable best efforts. Agent may either supply required labor and equipment and labor directly or may supply required equipment and labor through arrangements with other firms on behalf of Agent.

WTB Ex. 39, P. 3. Kay selected, purchased and provided all the equipment used in connection with the Management Agreement stations. Tr. 107, 351, 353. Paragraph IV of the agreement provides that all equipment provided by Kay shall remain his sole and exclusive property. WTB Ex. 39, P. 3. The equipment was "leased" to Sobel for a term coterminous with the agreement, but Sobel was given no title, interest, or

control over the equipment, except to the extent he was granted permission to use Kay's equipment. Id.

20. As discussed below in greater detail, Sobel currently works on maintaining and repairing the Management Agreement stations. Tr. 112. Nothing in the management agreement provides that Sobel will be the person who maintains and repairs the stations. Tr. 113, 359-360. Paragraph XX of the management agreement provides that the agreement "is the entire agreement between the Parties with respect to the subject matter thereof, making void all previous negotiations and agreements . . ." WTB Ex. 39, P. 8. Sobel testified that it was not necessary to have a provision in the agreement stating that he would maintain and repair the facilities because he was already performing that work. Tr. 113. Kay testified that it was a "basic assumption" that Sobel would be performing the work. Tr. 360.

21. Most of the Management Agreement stations and Kay's stations are located high on mountaintops. Tr. 118. Generally, Sobel must drive through locked security gates to get to the sites. *Id.* The buildings at the sites, as well as the cabinets containing the equipment, are often locked. *Id.* For both the Management Agreement stations and the Kay stations, Sobel has in his personal possession the keys he needs to access the sites and the equipment. *Id.* Generally, the control points for the Management Agreement stations are located at Sobel's home office, Sobel's car, and Kay's office. Tr. 118-119.

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Control Over Daily Operations

22. Paragraph I of the management agreement provides that Kay shall be the sole and exclusive agent for the sale of all services provided by the Management Agreement stations. WTB Ex. 39, P. 2, Tr. 119. Kay's duties include all administrative duties associated with marketing the stations, including, but not limited to, bookkeeping, billing and collections. WTB Ex. 39, P. 2. Kay is given the "sole and exclusive discretion" to negotiate and execute contracts with customers, and Sobel is relieved of any liability under those contracts. *Id.* Paragraph II of the management agreement appoints Kay as the "sole and exclusive Agent for the management of the Stations' transmitting facilities and associated business." *Id.* Kay's duties under this provision include "all management functions associated with the operation of the Stations, including but not limited to the invoicing of users, collection of payments from users, bookkeeping and accounting processes, disbursement of payments to suppliers of goods and services, and control point operation." Id. Kay employs a staff to assist in these duties. Tr. 339, *et seq*. Kay has the sole and exclusive right to negotiate and execute any contracts entered into under Paragraph II of the Management Agreement, and Sobel has no liability under those contracts. WTB Ex. 39, P. 2.

23. When a customer receives service on one of the Management Agreement stations, the customer signs a contract which is also signed by Kay. Tr. 119. The Management Agreement stations have several hundred customers. *Id.* Sobel does not know the number of customers per month who have signed up to be on the Management

Agreement stations in 1997. Tr. 122. Sobel recruits customers himself on his 450 MHz stations. Tr. 119. On occasion, Sobel will be approached by a customer who would be better placed on an 800 MHz system. *Id.* In that instance. Sobel will refer those customers either to Mr. Kay's stations or one of the Management Agreement stations. Tr. 119-120. He has not placed more than a handful of customers on the Management Agreement stations. Tr. 120. Kay and Sobel refer customers to one another, and they both receive referrals from and give referrals to other dealers. Tr. 318-319.

24. Kay's employees deal with the customers. Tr. 343. Kay's salespeople sell radios. Tr. 344. The salespeople do not know whether they are selling time on a repeater Kay owns, a repeater Kay manages, or a community repeater. *Id.* Some of Kay's customers are on Kay's stations, some customers are on just managed stations, and some customers are on both types of stations. Tr. 348-349. The important consideration in determining where a customer is placed is the needs of the customer. Tr. 344-345. Kay looks at factors such as where service is needed, how much air time is needed, when the air time is needed, and whether the customer is conventional or trunked. Tr. 345. Ownership of the repeaters is not an important factor in determining where to place a customer, and Kay does not prefer stations licensed to himself over stations licensed to Sobel. Tr. 346. When a salesperson has made a sale, the salesperson will go to Barbara Ashaur, a Kay employee, and request that a code and frequency be assigned. Tr. 344. About half the time, the salesperson will make the initial recommendation as to where to place the customer. Tr. 345. Sometimes, Ms. Ashaur can take care of assigning the codes herself. Tr. 347. If Ms. Ashaur needs

specific frequencies assigned or needs further assistance for some other reason, she will ask either Sobel or Kay for assistance, regardless of who owns the repeater in question. *Id.* Sobel assigns "an awful lot" of frequencies for Kay's stations. *Id.* Once the frequency and code are assigned, Ms. Ashaur generates a request to activate the customer's radio system. *Id.*

25. Only Sobel and Kay have the access codes needed to activate repeaters. Tr. 124. Kay's repeaters have computerized controllers, and each customer is assigned a specific code. *Id.* When the customer's code is activated, and the customer's radio transmits that tone, the repeater will repeat that customer's signal. Tr. 124-125. Sobel testified that he turns on "all" the codes for the Management Agreement stations, and he conducts the majority of the activations on Kay's stations. Tr. 123-124. Kay testified that Sobel performs slightly more than two-thirds of the activations for both the Management Agreement stations and Kay's stations. Tr. 347-348. When Sobel reviews frequency placement and activates customers on either the Management Agreement stations or Kay's stations, he is paid an hourly fee by Kay for that work. Tr. 125.

26. Kay and his employees bill customers and collect fees from customers for the Management Agreement stations. Tr. 120. A lot of customers (about 500 to 700) use both Kay stations and Management Agreement stations. Tr. 348-349. By and large, those customers receive one consolidated bill, unless the customer wishes to receive separate bills. Tr. 349. Kay or his employees perform the bookkeeping relating to the Management Agreement stations. Tr. 120. Kay or his

employees make sure any obligations incurred with respect to the Management Agreement stations get paid. *Id.* Kay or his employees keep and maintain the financial records for the Management Agreement stations. Tr. 120-121, WTB Ex. 39, P. 6. Sobel reviews the revenue levels for the Management Agreement stations every few months or six months. Tr. 121-122. He obtains the information from Kay's computer. Tr. 121. Sobel has free access to Kay's office during business hours. Tr. 237.

27. Sobel can learn of the need to work on the Management Agreement stations either from Kay's office or by monitoring the stations himself. Tr. 116. Sobel monitors the Management Agreement stations possibly at least once a month. Tr. 117. Sobel monitors Kay's stations as often as he monitors his own stations. *Id.* Currently, Kay rarely monitors the stations, although he monitored the stations more regularly until a couple of years ago. *Id.* Some of Kay's employees also monitor the Management Agreement stations when a customer calls and says a station does not work. *Id.* While giving a time frame is difficult, Sobel estimates that he maintains or repairs Management Agreement stations as a whole several times a month. Tr. 114. Sobel cannot distinguish based upon his invoices what work he has done on the Management Agreement stations and what work relates to Kay's stations. Tr. 116. It did not make any difference to Kay whether Sobel was working on a Management Agreement station or a station licensed to Kay. Tr. 243. Whenever Sobel performs work relating to a Management Agreement station, he is working as a contract technician for Kay, and Kay pays Sobel an hourly fee for that work. Tr. 106, 144.

28. Kay's technicians will check the repeaters and other equipment for stations Kay owns or manages. Tr. 341-343. A technician working on a repeater would have no reason to know who holds the license. Tr. 343. Similarly, a salesperson selling air time to a customer would have no reason to know whether the station the customer will be using is licensed to or managed by Kay. Tr. 344. By and large, none of Kay's employees performing work on a station would have any reason to know to whom the station is licensed. Tr. 340.

29. Sobel does not consider himself to be an absentee owner because he is involved in the operation of the stations on a day-to-day basis. Tr. 293-294. That involvement is as a contractor selected and paid by Kay. Tr. 144.

Preparation of Applications and Policy Decisions

30. Kay did the research needed to locate available frequencies for which Sobel could apply. Tr. 73. Kay would then tell Sobel of the frequency and review with Sobel information such as who else was on the channel, where the repeater would be located, and the need for the repeater. Tr. 73-74.

31. The Management Agreement stations are located at the following sites: Mount Lukens, Santiago Peak, Snow Peak, Hollywood Hills, Mount Wilson, Heaps Peak, and possibly Sunset Peak. Tr. 79-84.[2] Sobel uses the Hollywood

2. Many of the sites listed on the licenses (WTB Exs. 2-18) are secondary sites which are not required to be constructed under the Commission's Rules. Tr. 80. In several cases, Sobel could not recall whether secondary sites listed on his licenses had been constructed. Tr. 80-83.

Hills site for his 470 MHz stations, and he leases that site from Louella McNeal. Tr. 78. Sobel, in turn, subleases that property to Kay, who pays Sobel $7,000 to $8,000 a year in rent. Tr. 78, 250-251. For each of the other sites, Kay made the arrangements with the property owners to make sure the Management Agreement stations could operate from those sites, and he has leases with the property owners for those sites. Tr. 84-85. Under the management agreement, a transmitter site may be relocated on sixty days notice to Kay only if the relocation is in the best interests of both parties. WTB Ex. 39, P. 5.

32. Sobel initially testified that Kay prepared "most" of the Management Agreement applications. Tr. 74. He claimed that there were times when he prepared the applications personally, but he could not recall which applications he prepared. *Id.* The applications were prepared using specialized software from Slattery Software that Kay had on his computer. Tr. 74-75. Kay had a template in his computer that showed the various locations and contained the technical information needed for the applications. Tr. 206. The majority of Sobel's applications contain handwritten information concerning emission designators. WTB Ex. 1, Pp. 5, 8, 10, 12, 14, 16, 19, 21, 24. In every case, the handwriting is that of Kay. Tr. 76-78. While Sobel believes he could have prepared the applications himself, he knew Kay had the software and additional knowledge needed to prepare the applications, and it was more convenient "that he did the applications for me." Tr. 184.

33. Item 37 on FCC Form 574 asks for the name of the individual who completed the application form. WTB Ex. 1.

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In some of the Management Agreement applications, Sobel is sometimes identified as the person who completed the form, while in other applications, Kay is listed as the preparer. *Id.* Kay and Sobel construed Item 37 as asking for the identity of the person who should be contacted if there is a question, rather than asking who actually prepared the application. Tr. 208. Sobel is thus sometimes listed as the preparer of applications which were in fact prepared by Kay.

34. In some services, the Commission requires a non-agency entity called a "frequency coordinator" to review a land mobile application before it is submitted to the Commission in order to ensure that the application complies with the Commission's technical regulations and to ensure that spectrum is available. Tr. 86. The National Association of Business and Educational Radio (NABER) was a frequency coordinator for the frequencies used by the Management Agreement stations. *Id.* NABER requires applicants to fill out a form asking for basic information. *Id.* When dealing with NABER, Kay filled out the forms, and Sobel then signed the forms. WTB Ex. 2, Tr. 86-87.

35. Sobel reviewed and signed each application for the Management Agreement stations. Tr. 75, 206-207. The only edits Sobel can remember making to the applications occurred a couple of times when Kay misspelled Sobel's name. Tr. 75.

36. Kay has prepared letters for submission to the Commission regarding the Management Agreement stations. Tr. 335. Ordinarily, when the Commission finds a problem with a land mobile application, it returns the application to

the applicant with an application return notice. Tr. 234. The record contains three responses to application return notices involving Management Agreement Stations — all three responses were prepared by Kay. WTB Exs. 19, 21, 23; Tr. 88, 92, 96, 335-336, 338, 339. Sobel received the application return notices and asked Kay to prepare responses. Tr. 228-229.

Clearing of Channels and Acquisition and Disposition of Licenses

37. Unlike other services, land mobile frequencies are often shared with different licensees on the same frequency in the same area (an encumbered channel). Tr. 193. Under certain circumstances, however, a licensee can get exclusive use of a channel in an area (a clear channel). Id. A clear channel has several advantages over an encumbered channel. With a clear channel, a licensee can operate in an enhanced mode, there is no need to monitor the frequency for other users, and clear channels are substantially more valuable than encumbered channels. Tr. 195. There are several actions that can be taken towards clearing channels. If a party finds that another licensee has not operated its station for a year, it can ask the Commission to cancel the license and, in some cases, give the party the first opportunity to apply for the cancelled license. Tr. 196-197. If a co-channel station is operating, the licensee can attempt to persuade the co-channel licensee to cancel or to assign its license in return for new equipment or for favorable rates on repeater service on the licensee's repeaters. Tr. 197-198.

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38. All of the initial applications for the Management Agreement stations were for encumbered channels. Tr. 198-199. Sobel claims that he did not have the time or the money to do the work needed to clear the channels himself. Tr. 199. Kay and Sobel therefore agreed that Kay would do the work and spend the money needed to clear the channels used by the Management Agreement stations. Id. Sobel knew Kay had been successful in this activity in the past, and he believed Kay had the knowledge and staff needed to do this work. Id. Sobel works from 30 to 60 hours a week. Id. As a contractor, he has assisted Kay in doing the work needed to clear Kay's channels. Tr. 72-73.

39. The licenses for stations KNBT299, WNYR424, and WNPY680 were obtained through assignment. Tr. 101. Sobel paid nothing for those licenses, and he does not know whether money was paid for those licenses (or any of the other details on the assignments). Tr. 102.

40. Under Paragraph VII of the management agreement, Kay has the exclusive option to purchase any of the Management Agreement stations at any time for $500 each. WTB Ex. 39, P. 4. The sale includes not only the license and the station assets but also any business created by operation of the station. WTB Ex. 39, P. 5. Paragraph VII E. requires Sobel to "maintain exclusive ownership and control of the license for the Stations" until and unless the licenses are assigned to Kay. Id. Therefore, Sobel cannot sell any of the Management Agreement stations without Kay's permission. Tr. 125-126. In contrast, if Kay wished to sell any of the Management Agreement stations, he could exercise his option to purchase the station and then direct Sobel to assign the station to Kay's designee, even if Sobel objected.

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41. There are three stations subject to the Management Agreement that have been sold. Tr. 126. One station was sold to William Matson for between $70,000 and $100,000. Tr. 126, 366. Kay arranged for the sale of that station. Tr. 366. Sobel received $20,500 from that sale, and Kay received the balance of the money. Tr. 126-127, 366-367. Part of Kay's consideration for receiving the majority of the sales proceeds was expenses he incurred in clearing the channel. Tr. 127, 373. Sobel asked Kay for $20,000, and Kay agreed. Tr. 374. With respect to the second station that was sold, Sobel only received $500; Sobel does not know how much money the second station was sold for. Tr. 127-128. The third station was sold as part of a trade, so no money was exchanged. Tr. 127. The exchange appears to be part of Kay's work in clearing the Management Agreement channels because Sobel received a cancellation of a license on another frequency, which increased the value of one of his licenses. Tr. 128. Sobel convinced Kay not to accept a $1.5 million offer for the Management Agreement Stations. Tr. 275. Sobel believed that the Management Agreement station could generate enough profit to make the investment lucrative. Tr. 267-268.

Setting of Prices

42. Paragraph I of the management agreement gives Kay the sole right to negotiate contracts with customers. WTB Ex. 39, P. 2, Tr. 128. The standard rate charged to customers of both the Management Agreement stations and Kay's stations is twelve dollars a month for each mobile transmitter. Tr. 129. Kay charges the same rate for use of the 800 MHz stations licensed in his name. Id. Since Kay's salespeople do

not know whether they are selling time on a station owned by Kay or a station managed by Kay (Tr. 344), it follows that the rates for both types of stations would always be the same unless there were special negotiations. The last change in the standard rate was approximately three or four years ago. Tr. 129-130. Sobel does not recall whose idea it was to make that change. Tr. 130. At times, discounts are negotiated with the larger customers. Tr. 129. According to Sobel, Kay or his employees do the majority of the negotiating with customers, but he also does some negotiating with customers. *Id.* Sobel only discusses rates with Kay or his employees a handful of times a year, if that *Id.* Sobel also handles special problems involving Kay's customers. Tr. 72.

Retention of Counsel

43. Brown & Schwaninger became Sobel's FCC attorneys in the early-to-mid 1990s. Tr. 109. Kay introduced Sobel to that firm, which also represented Kay. Tr. 109, 370-371. Brown & Schwaninger represented both parties when they were preparing the management agreement. Tr. 109-110. Robert Keller, who also represents Kay in certain FCC matters, is currently Sobel's FCC counsel. Tr. 110. Sobel asked Kay whom he could use instead of Brown & Schwaninger, and Kay directed him to Mr. Keller. *Id.* Kay has paid all of Sobel's legal fees with respect to the Management Agreement stations, including the legal fees in connection with this hearing. Tr. 109, 112.

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Control Over Personnel

44. Sobel has no employees. Tr. 130. Sobel is not sure if he has ever hired a contractor to do work relating to the Management Agreement stations. *Id.* The employees of Kay who perform work relating to the Management Agreement stations are hired, fired, and supervised by Kay. *Id.*

45. As noted above, Kay's salespeople sell time on the Management Agreement stations as well as other stations Kay owns or manages. Tr. 344-345. The employees of Kay described below perform their duties with respect to the Management Agreement stations as well as other stations Kay owns or manages. Tr. 340, 342-343. Ms. Ashaur performs the billing, the receivables, and runs the accounting department, and sometimes serves as Kay's secretary. Tr. 339. Ophelia Nunez works on accounts receivable, posts monies, prepares bills, prepares bank deposits, works on legal matters, and prepares summons and complaints. Tr. 340-341. Damon Crowley, Sr. performs secretarial work, sorts files, performs accounts receivable and collections work, and works on legals. Tr. 341. Ken Schultz, who until recently was the acting general manager or service manager for Southland, is now a lead technician who repairs radios. Id. Randy French is a technician. Tr. 342. The technicians also check and test repeaters that may have failed. Tr. 343.

Payment of Operating Expenses

46. Under Paragraph IV of the Management Agreement, Kay is responsible for paying all expenses relating to the construction of the Management Agreement stations.

WTB Ex. 39, P. 3. Similarly, under paragraph XIII of the agreement, Kay is responsible for paying all expenses associated with the operation of the stations. WTB Ex. 39, P. 6, Tr. 131.

47. Kay estimates that his total investment in equipment for the Management Agreement stations is about $97,500. Tr. 354. Kay cannot accurately estimate how much he has paid in operating expenses for the Management Agreement stations because he does not break out his expenses based upon who holds the underlying licenses. Tr. 351-352. For example, Kay pays one check for rent on Mount Lukens, and pays one electric bill for equipment used by stations licensed to him, Sobel, or other stations he manages. Tr. 352. Kay explained that one reason he functions efficiently is that he cuts down "on a lot of extraneous and unnecessary bookkeeping to keep it simple." Tr. 355.

Receipt of Monies and Profit

48. The revenues from the operation of the Management Agreement stations are deposited into Kay's bank account, which is the same bank account that the revenues from the operation of Kay's owned stations are deposited. Tr. 348. Pursuant to the management agreement, if any station's monthly revenue exceeds $600 a month, Sobel is entitled to fifty percent of the excess revenue. WTB Ex. 39, P. 4. The revenue from four of the fifteen Management Agreement stations has each exceeded $600 a month. Tr. 132. However, because of the manner in which Kay and Sobel have opted to implement the agreement, Kay has retained all the money and will continue to do so until the total revenue from all the

stations exceeds $9,000 a month (i.e., $600 x 15 stations). *Id.* The last time Sobel checked the stations' monthly revenues, which was a few months ago, the total from the Management Agreement stations was between $6,000 and $7,000. *Id.* Except for the hourly fees Sobel has received from working for Kay on the Management Agreement stations, and the money he received in connection with the sale of two stations, Sobel has not received any money from the Management Agreement stations. Tr. 131-132.

B. *Misrepresentation/Lack of Candor Issue*[3]

January 1995 Affidavits

49. The January 24, 1995 affidavit executed by Sobel was submitted as part of a pleading entitled "Motion to Enlarge, Change, or Delete Issues" filed on Kay's behalf in the Kay proceeding on January 25, 1995. WTB Ex. 44. (Refiled Motion). The January 24, 1995 affidavit is similar to the affidavit executed by Sobel on January 11, 1995 which was submitted to the Commission as part of a pleading entitled "Motion to Enlarge, Change or Delete Issues" filed on Kay's behalf in the Kay proceeding on January 12, 1995. WTB Ex. 41 (Affidavit); WTB Ex. 41 (Motion). The Refiled Motion was filed because the Motion was misfiled with the Commission. Tr. 141, 369-370.

50. On January 9 or 10, 1995, Kay received an unsigned version of WTB Ex. 41 from Brown & Schwaninger. Tr. 370. Kay read the package, talked to Brown & Schwaninger, called

3. Sobel has not offered any proposed findings on the added misrepresentation issues

Sobel, and told him "that there was an affidavit that my attorneys wanted him to read. And, if correct, execute it." Tr. 371. Kay and Sobel then had a face-to-face meeting, and Kay asked Sobel if he would sign the document. Tr. 140, 371. Although he understood he could add anything he wanted to the document, Sobel signed the document without making any changes and without adding any material. Tr. 141.

51. The portion of the Motion relating to the licenses in Sobel's name reads as follows:

> James A. Kay, Jr. is an individual. Marc Sobel is a different individual. Kay does not do business in the name of Marc Sobel or use Sobel's name in any way. As shown by the affidavit of Marc Sobel attached as Exhibit II hereto, Kay has no interest in any of the licenses or stations held by Marc Sobel. Marc Sobel has no interest in any of the licenses or stations authorized to Kay or any business entity in which Kay holds an interest. Because Kay has no interest in any license or station in common with Marc Sobel and because Sobel was not named named [sic] as a party to the instant proceeding, the Commission should either change the OSC to delete the reference to the stations identified as stations 154 through 164 in Appendix A, or should dismiss the OSC with respect to those stations.

WTB Ex. 42, Pp. 7-8. The Refiled Motion makes the same factual statements and argument, although the language is

changed slightly because the pleading was filed with Judge Sippel as opposed to the Commission. WTB Ex. 44, Pp. 4-5. When Sobel was twice asked the question whether he understood the purpose of the affidavit was to attempt and have his licenses removed from the Kay hearing, his answers indicate that he did understand that to be the purpose. Tr. 142-143, *see also* Tr. 164.

52. Nothing in the affidavits or the pleadings, WTB Exs. 41-44, provides any description of the actual relationship between Sobel and Kay with respect to the Management Agreement stations. The affidavits and the pleadings fail to disclose the following acts to the Commission and the Presiding Judge: (1) Kay manages Sobel's 800 MHz stations pursuant to a Management Agreement (Tr. 103-104, 108-109); (2) Kay was responsible for finding the frequencies and preparing the applications for the Management Agreement stations (Tr. 73-75); (3) Kay provided all the money and the equipment needed to build the Management Agreement stations (Tr. 144); (4) when Sobel worked on the stations, he did so as a contractor selected and paid by Kay (Tr. 106-108); (5) Kay made the arrangements to acquire and dispose of these licenses (Tr. 101, 126-128, 366); (6) Kay's employees were involved in virtually every aspect of the stations' daily operations (Tr. 339-347); (7) Kay paid all the expenses of the Management Agreement stations, including Sobel's legal fees (Tr. 109, 131); (8) the revenues from the Management Agreement stations were deposited in Kay's bank account, and Sobel has not received any of the operating revenues of the stations (Tr. 144, 348); (9) Kay may purchase the Management Agreement stations at any time for $500 each (Tr. 125); and (10) Kay had agreed to purchase the stations upon Sobel's death (WTB Ex. 47, Tr. 137-138).

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53. Sobel believed that the reason the Commission was delaying the processing of his applications and finder's preference requests was because of the relationship he had with Kay. WTB Ex. 46. He believed the Commission was "confused" about the relationship. Tr. 258. Sobel understood that the Commission would want to know about the actual relationship between himself and Kay. Tr. 143, 151, 156. Notwithstanding those facts, Sobel claims that he did not think the Presiding Judge in the Kay proceeding would have wanted to know the actual relationship between himself and Kay because it "wasn't necessary" or it wasn't "the forum to do it." Tr. 143, 156. Sobel described the purpose of the affidavit "was to establish to the Bureau that I am not an a/k/a of Mr. Kay. I am a real living person and they screwed up." Tr. 143.

54. Sobel claims that he had an expectation that when he signed the affidavit, the Bureau would obtain or become aware of the management agreement. Tr. 302. He and Kay discussed the possibility that their relationship would be explored in discovery in the Kay proceeding. Tr. 300. Sobel claims he had no expectation that by signing the affidavit, he was going to prevent the Bureau from becoming aware of the agreement. Tr. 302.

55. The record shows that Kay found the frequencies for Sobel to apply for, and he prepared most, if not all, of the applications. Tr. 143-144, WTB Ex. 1. Kay provided the equipment and the money needed to build the stations. Tr. 107-108, 144. Kay's personnel performed services with respect to the stations. Tr. 144. The work Sobel performs on the stations is as a contractor for Kay. Id. Kay sells service

on the stations. Id. He pays all the expenses relating to the stations. *Id.* The operating revenue from the stations goes to Kay. *Id.* Kay can buy these stations at any time for $500 each. Tr. 145. Kay is obligated to buy the stations if Sobel dies. *Id.*, WTB Ex. 47.

56. Sobel testified that what he meant by the statement "Mr. Kay has no interest in any radio station or license of which I am the licensee" was that "the station license was issued to myself. It wasn't issued to him." Tr. 146. He said, "The context in which I said the word interest was an ownership interest in the license, not necessarily in ownership of the equipment or whether he would or would not make any money from the station." Id. When counsel for the Bureau pointed out that Sobel stated in the affidavit that Kay had no interest in any of Sobel's stations as well as Sobel's licenses, the following exchange ensued:

> Q. In fact, he (Kay) owned the equipment. Correct?
>
> A. But he rented it to me. I pay him for it, so he didn't have an interest in it. The issue here is that the radio station license is mine, not his. He had no part of it. That's what the context of this affidavit was.

Tr. 147-148. The management agreement defines the term "Stations" as meaning the "800 MHz band radio facilities", *i.e.*, the equipment (physical facilities). WTB Ex. 39, P. 1. With respect to Sobel's claim in the affidavit (and on the

witness stand) that Kay has no interest in the equipment, Paragraph IV A. of the management agreement provides:

> During the term of this agreement all equipment provided by Agent [i.e., Kay] and leased by Licensee [i.e., Sobel] shall remain the sole and exclusive property of Agent. Nothing contained herein shall be interpreted to provide to Licensee any title, interest, or control over said equipment, except such use of the equipment as is specifically described herein.

WTB Ex. 39, P. 3.

57. Sobel admitted that Kay's receipt of monies and revenues from the Management Agreement stations was an interest, "but not in the context which I signed this affidavit." Tr. 148. When asked whether Kay's right to buy the stations for $500 each was an interest, Sobel responded, "Whatever happens in the future, I don't know." *Id.*

58. Sobel testified that when he signed the affidavit, he thought about the word "interest" "because it was the only thing in here" that "might have been questionable . . ." Tr. 156. Kay recalls that when he and Sobel met to discuss the affidavit, Sobel asked him about the meaning of the word "interest." Tr. 371. Kay told him that to the best of his knowledge, as it had been explained to him:

> It referred to ownership as in a partnership or ownership of stock, as having a direct financial

> stake in something. Being an owner or a stockholder or direct party to something.

Id. Sobel testified that Kay has a direct financial stake in the Management Agreement stations Tr. 150. He testified that he does not think Kay told him that a direct financial stake is an interest in a business. *Id.* Kay denied having a financial stake in the licenses, but he admitted that with respect to the stations, he owned the equipment and that he obtains revenues from the stations. Tr. 372.

59. The record also discloses that Sobel has done extensive work for Kay with respect to both the stations licensed to Kay, as well as the Management Agreement stations. *See) generally)* WTB Ex. 25. Sobel is paid an hourly fee by Kay for that work. Tr. 106. Sobel believes that despite the extensive work he has done for Kay, he has never been an employee of Kay. Tr. 246. He doesn't believe Kay has ever made any tax withholdings for Sobel, and he has never received any W-2 forms from Kay. Tr. 247. Sobel believes he complies with the IRS guidelines for being an independent contractor. Tr. 247-248.

60. Although the affidavit makes the claim that Sobel is not an employee of Kay, Sobel claims that it "wasn't appropriate subject material" to mention that he performed various types of work for Kay as a contractor. Tr. 150. He denied it was deceptive to tell the Commission he was not an employee of Kay without stating that he performed work for Kay as a contractor. Tr. 150-151. He claimed it was not relevant "for the purpose of this affidavit" to mention the work he performed for Kay, and he repeated his claim

that the affidavit was designed to tell the Commission he was a "separate person." Tr. 151. He knew the Commission wanted to know what the relationship was between Kay and himself. Id.

61. Sobel periodically contacts customers or potential customers on Kay's behalf. Tr. 72, 327-328. Sobel performs this work as part of his contracting business. Tr. 72. The Management Agreement stations, which are licensed to Sobel, are marketed in Kay's name or names under which Kay conducts business. Tr. 152-153. Kay signs all the customer contracts, performs the billing, and receives all the revenues from customers using the Management Agreement stations. Tr. 119-120, 132. When asked why it was not deceptive to omit the fact that Kay was doing business for these stations in Kay's name, Sobel testified it was because Kay's agreement with the customers was a separate agreement from Sobel's agreement with Kay. Tr. 153.

The Management Agreement

62. Sobel repeatedly testified that the purpose of the Management Agreement was to show that he and Kay were separate entities doing business together. Tr. 258, 262-263. The alleged purpose of the Management Agreement was to explain the relationship between Sobel and Kay. Tr. 301. Sobel asked for his oral agreement with Kay to be reduced to writing because "the Commission was confused about our relationship between Mr. Kay and myself." Tr. 258. Notwithstanding those facts, Sobel did not file the written agreement with the Commission when he signed it. Tr. 303. When the Presiding Judge first asked whether Sobel filed

the agreement when he signed it, Sobel attempted to claim that Kay filed the agreement along with Kay's motion to enlarge. *Id.* Counsel for Sobel then stipulated that Sobel was incorrect. *Id.* In fact, Sobel did not submit the Management Agreement to the Commission until July 3, 1996, after the Commission specifically asked for it in its letter of inquiry to Sobel. Tr. 313-314.

The Stanford Letter

63. On December 6, 1994, Sobel wrote to Gary Stanford at the Federal Communications Commission office in Gettysburg, PA. WTB Ex. 46. Sobel composed the letter personally. Tr. 158. The letter complains about Sobel's applications being held up because of an investigation of Kay. WTB Ex. 46, P. I. Sobel represented to the Commission in his letter:

> I can only assume that I have been "black listed" by Mr. Hollingsworth and am having my applications held, my customer's applications held, and my finder's preference requests ignored due to my association with Mr. Kay. Contrary to whatever beliefs that may be held by Mr. Hollingsworth, which have resulted in his taking unwarranted actions against me, I would like to assure you that I am an Independent Two Way Radio Dealer. I am not an employee of Mr. Kay's or of any of Mr. Kay's companies. I am not related to Mr. Kay in any way. I have my own office and business telephone numbers. I advertise under my own company name in the Yellow Pages. My

> business tax registration and resale tax permits go back to 1978 - long before I began conducting any business whatsoever with Mr. Kay - the apparent target of Mr. Hollingsworth.

WTB Ex. 46, P. 1 (emphasis in original). The letter does not state the following facts: (1) Kay manages Sobel's 800 MHz stations pursuant to a Management Agreement (WTB Ex. 39); (2) Kay was responsible for finding the frequencies and preparing the applications for the Management Agreement stations (Tr. 73-75); (3) Kay provided all the money and the equipment needed to build the Management Agreement stations (Tr. 144); (4) when Sobel worked on the stations, he did so as a contractor selected and paid by Kay (Tr. 106-108); (5) Kay made the arrangements to acquire and dispose of these licenses (Tr. 101, 126-128); (6) Kay's employees were involved in virtually every aspect of the stations' daily operations (Tr. 339-347); (7) Kay paid all the expenses of the Management Agreement stations, including Sobel's legal fees (Tr. 109, 131); (8) the sales, billing, collections and record keeping for the Management Agreement stations was performed by Kay and his staff at Kay's office (Tr. 339-347); and (9) the revenues from the Management Agreement stations went into Kay's bank account and Sobel had not received any of the operating revenues of the stations. Tr. 144, 348. Notwithstanding those facts, Sobel repeatedly testified at the hearing that he is independent of Kay with respect to the Management Agreement stations. Tr. 157-159.

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Responses to Application Return Notices

64. In the responses to the application return notices relating to the Management Agreement stations (WTB Exs. 19, 21, and 23), Kay provided invoices from certain customers of the Management Agreement stations. WTB Ex. 19, Pp. 4-7, WTB Ex. 21, Pp. 5-7, WTB Ex. 23, Pp. 4-7. Certain information is masked out on the invoices, and it was masked out when it was sent to the Commission. Id., Tr. 88. While Kay does not recall masking out the information, he testified he probably did so. Tr. 337-339. The information that was masked out on the invoices was the name and address of Lucky's Two-Way Radio, a name under which Kay does business (Tr. 333). Tr. 90-91, 94. The information concealed from the Commission was the fact that Lucky's performed the billing for the Management Agreement stations. While Sobel does not specifically recall seeing these letters with the masked out invoices attached, he believes he did because the letters came from his files. Tr. 238-239. Sobel and Kay testified that the name and address of Lucky's was masked out because it was "unnecessary" or "irrelevant." Tr. 91, 95, 98, 337-339. None of the other information on the invoices was masked out, including the fees charged the customers. WTB Ex. 19, Pp. 4-7, WTB Ex. 21, Pp. 5-7. WTB Ex. 23, Pp. 4-7.

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Conclusions of Law

Unauthorized Transfer of Control Issue

65. Section 310 (d) of the Communications Act of 1934, as amended, 47 U.S.C. Sec. 310 (d), states, in pertinent part:

> No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.

66. The HDO in this proceeding summarized the law concerning control of a non-broadcast facility or license:

In determining whether de facto control of a non-broadcast license or facility has been transferred in violation of Section 310 (d), the Commission and the courts have traditionally relied upon a six-part test announced in *Intermountain Microwave*, 24 RR 983 (1963). The six indicia of de facto control are:

> (a) Does the licensee have unfettered use of all facilities and equipment?
> (b) Who controls daily operations?

(c) Who determines and carries out the policy, decisions, including preparing and filing applications with the Commission?
(d) Who is in charge of employment, supervision and dismissal of personnel?
(e) Who is in charge of the payment of financing obligations, including expenses arising out of operating.
(f) Who receives monies and profits from the operation of the facilities.

See also *Telephone and Data Systems, Inc. v. FCC*, 19 F. 3d 42 (1994), and *La Star Cellular Telephone Co.*, 5 FCC Rcd 3286 (1990). The Commission has held that actual control is the touchstone of the *Intermountain* test. *See e.g. News International, PLC*, 97 FCC 2d 349, 355-56 (1984).

67. The record clearly demonstrates that, in light of the above cited standards, Kay has been entrusted with and in fact excercised [sic] virtually all aspects of operation of Sobel's Management Agreement stations. The record reveals the following participation by Kay. Kay has prepared the applications for Sobel's Management Agreement stations, as well as the letters which were submitted in response to the Commission's return notice. Findings 11, 32, 33, 36. Kay selected, purchased and provided all the equipment used in connection with the Management Agreement stations. Finding 18. Kay is the exclusive supplier of labor required to maintain and repair the stations' facilities. Finding 18. Kay controls the hiring and firing of personnel to operate the

Management Agreement stations. Findings 44, 45. Pursuant the Management Agreement Kay has assumed all administrative duties associated with marketing the stations, including bookkeeping, billing and collections. Finding 22. Kay is responsible for paying all expenses relating to the construction of the Management Agreement stations and the expenses associated with the operation of same. Findings 46, 47. Kay has the discretion to negotiate (including the setting of prices) and execute contracts with customers on the Management Agreement stations. Finding 42. Kay did the work and provided the money to clear the channels used by the Management Agreement stations. Finding 37. The licenses for three of Sobel's Management Agreement stations were obtained through assignments, but Sobel could not relate any of the details on the assignments. Finding 39. Kay has the exclusive option to purchase any of the Management Agreement stations at any time for $500.00 each. The sale would include not only the license and the station assets, but also any business created by the duration of the station. Finding 40. The revenues from the operation of the Management Agreement stations are deposited into Kay's bank account. Finding 48.

68. In light of all the foregoing and on the record taken in its entirety, it is abundantly clear that Kay has the ultimate control of Sobel's Management Agreement stations. This transfer of control has not been authorized by any Commission action. Accordingly the unauthorized transfer of control issue must be resolved against Sobel.

Appendix J

Misrepresentation/Lack of Candor Issue

69. Commission precedent holds that misrepresentation involves false statements of facts made with an intent to deceive the Commission. Lack of candor involves concealment, evasion and other failures to be fully forthcoming or informative, accompanied by an intent to deceive the Commission. Both represent deceit, differing only in form. *Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129. Intent may be found from the false statement of fact coupled with proof that the party making it had knowledge of its falsity. See *David Ortiz Radio Corp. v. FCC*, 941 F 2d 1253, 1260 (D.C.Cir. 1991). Intent may also be found from motive. See *Joseph Bahr*, 10 FCC Rcd 32,33 (Rev. Bd. 1994).

70. Absolute candor is perhaps the foremost prerequisite for Commission licenseeship. *Catoctin Broadcasting Corp. of New York*, 2 FCC Rcd 2126 (Rev. Bd. 1987), aff'd in pertinent part, 4 FCC 2d 2553 (1989), *recon. denied* 4 FCC Rcd 6312 (1989). The duty of candor requires applicants to be fully forthcoming as to all facts and information that may be decisionally significant to their applications. *Swan Creek Communications v. FCC*, 39 F 2d 1217, 1222 (D.C. Cir. 1994).

71. As noted above, Sobel submitted an affidavit in a FCC proceeding against Kay. The intended effect was to persuade the Commission to understand that Kay and Sobel were separate entities, each operating his separate business and neither having any interest in the other's licenses or radio stations. However the record demonstrates that the Sobel's averment differed from the actual state of facts. Record

evidence clearly shows that at the time Sobel executed the above stated affidavit Kay was managing Sobel's 800 MHz stations pursuant to the Management Agreement; that Kay was responsible for finding the frequencies and preparing the applications for the Management Agreement stations; that Kay provided all the money and equipment needed to build the Management Agreement stations; that when Sobel worked on his own 800 MHz stations he did so as a contractor selected and paid by Kay; that Kay made the arrangements to acquire and dispose of Sobel's licenses that Kay's employees were involved in virtually every aspect of the daily operations of the Management Agreement stations; that Kay paid all the expenses of these stations including Sobel's legal fees; that the revenues from the operation of the Management Agreement stations were deposited in Kay's bank account; that Sobel has not received any of the operating revenues of the stations; that Kay has the option to purchase the Management Agreement stations at any time for 500 each; and that Kay had agreed to purchase the Management Agreement stations upon Sobel's death. Finding 52.

72. Additonally [sic], at the time Sobel executed the affidavit he worked for Kay with respect to both the stations licensed to Kay, as well as the Management Agreement stations. Sobel received an hourly pay for that work. Finding 59. Also, Sobel's Management Agreement stations were marketed in Kay's name or names under which Kay conducted business. Finding 61.

73. All of this amounts to a fair amount of interest. Sobel maintains that the word interest used in the context of the affidavit only means having legal title. But this assertion must be rejected as being false. Sobel has admitted that when he read

the affidavit be wondered about the word "interest" and met with Kay to discuss the affidavit. Kay recalls that he told Sobel that it was explained to him that the word interest referred to "ownership. . . . as having a direct financial stake in something." Finding 58. Both Kay and Sobel had strong motive to withhold from the Commission the true nature of their business relationship. Sobel well realized that had he been truthful in his affidavit his requests for finders' preference would have been placed in jeopardy. The wording of the affidavit was calculated to ward off the Commission from being apprised of the true nature of the Kay - Sobel business relationship. Such dissembling may not be countenanced.

74. Sobel also exhibited lack of candor regarding the Management Agreement. Sobel maintains that in late 1994 he requested of Kay that their oral agreement regarding Sobel's 800 MHz stations be reduced to writing because the Commission was confused about their relationship. But, even though the Management Agreement fully disclosed their relationship, Sobel did not voluntarily submit it to the Commission until requested by the Commission to do so in a letter of inquiry. Finding 62. Considering the context of the Management Agreement, it is obvious that Sobel could ill afford the Commission being apprised of it.

75. And again, in his letter to Gary Stanford at the FCC office in Gettysburg, Pa. Sobel had the opportunity to disclose to the Commission his true relationship with Kay but failed to do so. Rather be strongly asserted his independence from Kay in the operation of his stations.

76. The record also shows that in response to the application return notices relative to Sobel's Management

Agreement station invoices were provided but the name and address of Lucky's Two Way Radio (one of Kay's business names) were masked out. Kay and Sobel testified that the masking was made because that information was irrelevant but no other information was masked out. Of course, not to have masked out Kay's business name and address from Sobel's invoice would have alerted the Commission that Kay & Sobel were not as independent of one another as Sobel has claimed. The withholding of this information was deemed crucial by Sobel as well as by Kay.

77. The findings establish, and it is concluded that Sobel intended to mislead and deceive the Commission with respect to Kay's actual role in the affairs of Sobel's 800 MHz stations. There is no doubt that if Sobel had wanted the Commission to know about Kay's true activities regarding Sobel's stations, a clear statement to that effect would have been submitted and the Commission would have known in no uncertain terms exactly what Kay was doing. The fact that no such statement was submitted until the Commission requested the Management Agreement indicates that Sobel had no intention of disclosing those activities to the Commission.

78. The ultimate issue in this proceeding is to determine, in light of the evidence adduced under the unauthorized transfer of control issues and the misrepresentation/lack of candor issues, whether Sobel possesses the requisite qualifications to be or remain a licensee. The record compels the conclusion that Sobel is unfit to be a licensee. It has been concluded that Sobel unlawfully transferred control of his Management Agreement 800 MHz stations without Commission authorization, made misrepresentations and lacked candor about the transfer of control. Sobel's misconduct is deemed egregious in that it was

wilful, [sic] repeated and continued throughout the hearing. Sobel cannot be relied upon in the future to have the essential character traits of truthfulness and reliability. The record amply demonstrates that Sobel cannot be expected to meet the burden of licensees to be forthcoming in their dealings with the Commission and to comply with the rules and policies. Revocation of all Sobel's licenses is mandated.

79. With respect to the question of whether a forfeiture should be assesed [sic] against Sobel for an unauthorized transfer of control. It is concluded that in light of the revocation of all Sobel's licenses a forfeiture assessment is not necessary.

Accordingly, IT IS ORDERED THAT unless an appeal from this this [sic] Initial Decision [sic] is taken by a party or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules,[4] the licenses held by Marc Sobel or Marc Sobel d/b/a Air Wave Communications and designated for hearing in this proceeding ARE REVOKED, that the applications designated for hearing in this proceeding ARE DENIED, and that the finder's preference requests filed by Marc Sobel and designated for hearing in this proceeding ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

John M. Frysiak
Administrative Law Judge

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4. In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release, pursuant to 47 C.F.R. 1.27(d).

APPENDIX K — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DENYING PETITION FOR REHEARING FILED APRIL 5, 2005

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

No. 02-1175 **September Term, 2004**

Filed On: April 5, 2005 [887537]

James A. Kay, Jr.,

Appellant

v.

Federal Communications Commission,

Appellee

Consolidated with 04-1045

BEFORE: Edwards, Sentelle, and Randolph, Circuit Judges

ORDER

Upon consideration of appellants' petition for rehearing filed March 17, 2005, it is **ORDERED** that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Michael C. McGrail
Deputy Clerk

APPENDIX L — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DENYING PETITION FOR REHEARING EN BANC FILED APRIL 5, 2005

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

No. 02-1175 **September Term, 2004**

Filed On: April 5, 2005 [887536]

James A. Kay, Jr.,

Appellant

v.

Federal Communications Commission,

Appellee

Consolidated with 04-1045

BEFORE: Ginsburg, Chief Judge, and Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel, Garland, and Roberts, Circuit Judges

ORDER

Upon consideration of appellants' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

Appendix L

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Michael C. McGrail
Deputy Clerk

APPENDIX M — RELEVANT STATUTES

5 U.S.C. § 554
Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a?[1] administrative law judge appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for—

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency. An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

[1] So in original.

Appendix M

5 U.S.C. § 555
Ancillary matters

(a) This section applies, according to the provisions thereof, except as otherwise provided by this subchapter.

(b) A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding. So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function. With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it. This subsection does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding.

(c) Process, requirement of a report, inspection, or other investigative act or demand may not be issued, made, or enforced except as authorized by law. A person compelled to submit data or evidence is entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

(d) Agency subpoenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought. On contest, the court shall sustain the subpoena or similar process or demand to the extent that it is found to be in accordance with law. In a proceeding for enforcement, the court shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

(e) Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

Appendix M

5 U.S.C. § 556
Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more administrative law judges appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—

(1) administer oaths and affirmations;

(2) issue subpoenas authorized by law;

(3) rule on offers of proof and receive relevant evidence;

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) regulate the course of the hearing;

(6) hold conferences for the settlement or simplification of the issues by consent of the parties or by the use of alternative means of dispute resolution as provided in subchapter IV of this chapter;

(7) inform the parties as to the availability of one or more alternative means of dispute resolution, and encourage use of such methods;

(8) require the attendance at any conference held pursuant to paragraph (6) of at least one representative of each party who has authority to negotiate concerning resolution of issues in controversy;

(9) dispose of procedural requests or similar matters;

(10) make or recommend decisions in accordance with section 557 of this title; and

(11) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557 (d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section

557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

5 U.S.C. § 557
Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554 (d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings

pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses—

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions. The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

(d)

(1) In any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of ex parte matters as authorized by law—

(A) no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding;

(B) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the agency an ex parte communication relevant to the merits of the proceeding;

(C) a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes or knowingly causes to be made, a communication prohibited by this subsection shall place on the public record of the proceeding:

(i) all such written communications;

(ii) memoranda stating the substance of all such oral communications; and

(iii) all written responses, and memoranda stating the substance of all oral responses, to the materials described in clauses (i) and (ii) of this subparagraph;

(D) upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this subsection, the agency, administrative law judge, or other employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation; and

(E) the prohibitions of this subsection shall apply beginning at such time as the agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge.

(2) This subsection does not constitute authority to withhold information from Congress.

5 U.S.C. § 558
Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses

(a) This section applies, according to the provisions thereof, to the exercise of a power or authority.

(b) A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.

(c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law

and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given—

(1) notice by the agency in writing of the facts or conduct which may warrant the action; and

(2) opportunity to demonstrate or achieve compliance with all lawful requirements.

When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

5 U.S.C. § 559
Effect on other laws; effect of subsequent statute

This subchapter, chapter 7, and sections 1305, 3105, 3344, 4301 (2)(E), 5372, and 7521 of this title, and the provisions of section 5335 (a)(B) of this title that relate to administrative law judges, do not limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, requirements or privileges relating to evidence or procedure apply equally to agencies and persons. Each agency is granted the authority necessary to

comply with the requirements of this subchapter through the issuance of rules or otherwise. Subsequent statute may not be held to supersede or modify this subchapter, chapter 7, sections 1305, 3105, 3344, 4301 (2)(E), 5372, or 7521 of this title, or the provisions of section 5335 (a)(B) of this title that relate to administrative law judges, except to the extent that it does so expressly.

47 U.S.C. § 312
Administrative sanctions

(a) The Commission may revoke any station license or construction permit—

(1) for false statements knowingly made either in the application or in any statement of fact which may be required pursuant to section *308* of this title;

(2) because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application;

(3) for willful or repeated failure to operate substantially as set forth in the license;

(4) for willful or repeated violation of, or willful or repeated failure to observe any provision of this chapter or any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States;

(5) for violation of or failure to observe any final cease and desist order issued by the Commission under this section;

(6) for violation of section 1304, 1343, or 1464 of title 18; or

(7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station, other than a non-commercial educational broadcast station, by a legally qualified candidate for Federal elective office on behalf of his candidacy.

(b) Where any person (1) has failed to operate substantially as set forth in a license, (2) has violated or failed to observe any of the provisions of this chapter, or section 1304, 1343, or 1464 of title 18, or (3) has violated or failed to observe any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action.

(c) Before revoking a license or permit pursuant to subsection (a) of this section, or issuing a cease and desist order pursuant to subsection (b) of this section, the Commission shall serve upon the licensee, permittee, or person involved an order to show cause why an order of revocation or a cease and desist order should not be issued. Any such order to show cause shall contain a statement of the matters with respect to which the Commission is inquiring

and shall call upon said licensee, permittee, or person to appear before the Commission at a time and place stated in the order, but in no event less than thirty days after the receipt of such order, and give evidence upon the matter specified therein; except that where safety of life or property is involved, the Commission may provide in the order for a shorter period. If after hearing, or a waiver thereof, the Commission determines that an order of revocation or a cease and desist order should issue, it shall issue such order, which shall include a statement of the findings of the Commission and the grounds and reasons therefor and specify the effective date of the order, and shall cause the same to be served on said licensee, permittee, or person.

(d) In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission.

(e) The provisions of section 9(b) [5 U.S.C. 558(c)(1) and (2)] of Administrative Procedure Act which apply with respect to the institution of any proceeding for the revocation of a license or permit shall apply also with respect to the institution, under this section, of any proceeding for the issuance of a cease and desist order.

(f) For purposes of this section:

(1) The term "willful", when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective

of any intent to violate any provision of this chapter or any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States.

(2) The term "repeated", when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.

(g) If a broadcasting station fails to transmit broadcast signals for any consecutive 12-month period, then the station license granted for the operation of that broadcast station expires at the end of that period, notwithstanding any provision, term, or condition of the license to the contrary.